Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF	)	
	)	
Implementation of State and Local Governments	)	WT Docket No. 19-250
	)	
	)	
Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	RM-11849
	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-84
	)	

JOINT REPLY COMMENTS OF CITY OF SAN DIEGO, CAL.; CITY OF BEAVERTON, OR.; CITY OF BOULDER, COLO.; TOWN OF BRECKENRIDGE, COLO.; CITY OF CARLSBAD, CAL.; CITY OF CERRITOS, CAL.; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CITY OF CORONADO, CAL.; TOWN OF DANVILLE, CAL.; CITY OF ENCINITAS, CAL.; CITY OF GLENDORA, CAL.; KING COUNTY, WASH.; CITY OF LACEY, WASH.; CITY OF LA MESA, CAL.; CITY OF LAWNDALE, CAL.; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; CITY OF NAPA, CAL.; CITY OF OLYMPIA, WASH.; CITY OF OXNARD, CAL.; CITY OF PLEASANTON, CAL.; CITY OF RANCHO PALOS VERDES, CAL.; CITY OF RICHMOND, CAL.; TOWN OF SAN ANSELMO, CAL.; CITY OF SAN MARCOS, CAL.; CITY OF SAN RAMON, CAL.; CITY OF SANTA CRUZ, CAL.; CITY OF SANTA MONICA, CAL.; CITY OF SOLANA BEACH CAL.; CITY OF SOUTH LAKE TAHOE, CAL.; CITY OF TACOMA, WASH.; CITY OF THOUSAND OAKS, CAL.; THURSTON COUNTY, WASH.; CITY OF TUMWATER, WASH.

Reply Comment Date: November 20, 2019

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INTRODUCTION AND SUMMARY

Petitioners and their industry allies urge the Commission to adopt myriad "clarifications" needed, they say, to resolve unreasonable delays and alleged gamesmanship by mostly unidentified municipalities. But the proposals in these Petitions are neither mere "clarifications" nor do they make the Commission's rules any clearer.

Changes to the shot clock rules would allow applicants to determine when and how they submit requests for approval, even if the submittal contravenes established local processes, and inject ambiguity as to whether any incomplete notices, denials or even approvals were effective. Changes to the substantial-change criteria would dramatically limit concealment elements protected under existing Commission rules and abrogate (or eliminate) commonsense limitations on new equipment cabinets, height extensions and site expansions. As explained in Western Communities Coalition's joint comments and replies, proposals such as these make it difficult or impossible to determine when the shot clock starts, tolls or stops, and just as difficult to determine whether a substantial change would occur.

These proposals are unjustified. Data collected from actual applications shows that municipalities act within the shot clock and work well with applicants to resolve issues that might otherwise be fatal to its eligibility under Section 6409(a). Indeed, the longest delays appear attributable to the applicants who fail to respond to incomplete notices and/or pick up their construction permits in a timely manner.

Some proposals are also unreasonably dangerous. The notion that a deemed-granted remedy automatically authorizes construction "on day 61" exposes the public to unregulated utility construction and excavation on an unprecedented scale. Comments by the Communications Workers of America illustrated the death and property destruction that accidents in utility deployments can cause. Given the Commission's and the industry's expectation that 5G will involve several hundred thousand new deployments in dense deployments and close proximity to where people live, work and travel, it is difficult to understand how the Commission (or the industry) could even consider automatically authorized construction under any circumstances.

Western Communities Coalition respectfully urges the Commission to reject the Petitions. The current rules work reasonably well and the proposed "clarifications" and remedies would only cause confusion, conflict and harm to public health, safety and welfare. If the Commission feels compelled to consider the proposals in the Petitions, Western Communities Coalition respectfully notes that it must do so by the same notice of proposed rulemaking process used to adopt the existing rules.

COMMENTS

I. WESTERN COMMUNITIES AGREES WITH NLC ET AL. THAT THE COMMISSION CANNOT ADOPT SUBSTANTIVE AMENDMENTS TO SECTION 6409(A) RULES BY DECLARATORY RULING

A. The Petitions Seek New Rules and Substantive Amendments to Existing Rules Cloaked as Mere "Clarifications"

Substantive rules "effect a change in existing law or policy or . . . affect individual rights and obligations."[1] In contrast to interpretive rules, which "simply indicates an agency's reading of a statute or a rule," substantive rules carry the "force and effect of law."[2]

No one seriously disputes that the Commission's rules adopted in the *2014 Infrastructure Order* carry the force and effect of law. The Commission adopted these rules in accordance with the procedures for rulemaking laid out in the APA.[3]

Comments in the record by both industry and municipal advocates illustrate how the Petitions would create new rules and substantive changes in the existing law:

- **Shot Clock Commencement:** Whereas the Commission's existing rules preserve local governments' right to require an application for eligible facilities requests, the proposed "clarifications" would allow applicants to bypass any local process either not specifically designed for eligible facilities requests or

[1] *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)) (internal quotation marks removed).
[2] *See Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2006) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)) (internal quotation marks removed).
[3] *See* 5 U.S.C. § 553. On December 5, 2013, the Commission published a notice of proposed rulemaking in the Federal Register. 78 Fed. Reg. 73144–02 (Dec. 5, 2013). Over a comment period that spanned several months, the Commission received more than 207 timely filed comments and 42 timely filed reply comments. *See 2014 Infrastructure Order* at ¶ 12 n.18. On October 17, 2014, the Commission adopted the *2014 Infrastructure Order* that contains new rules together with their basis and purpose, which was subsequently published on January 8, 2015, in the Federal Register. 80 Fed. Reg. 1238-70 (Jan. 8, 2015).

that the applicant deems inconsistent with Section 6409(a). Instead, the shot clock would commence on *any written request* by an applicant to the local government.

- **Local Findings for Denial:** Neither the statute nor the Commission's regulations contain any requirements for local denials—the proposed "clarifications" would spin new rules from whole cloth. These standards would be more onerous than those required by the U.S. Supreme Court's decision in *T-Mobile South, LLC v. City of Roswell*, which interpreted the standards for a written denial under Section 332(c)(7)(B)(iii).

- **Deemed Granted Remedies:** Existing regulations simply deem applications granted and authorize applicants to seek judicial orders as needed to collect the permits required for construction; the proposed "clarifications" would authorize applicants to commence construction without any local authorization and impose a new limitations period on *local governments* to challenge the deemed granted notice.

- **Limits on Height Increases for Towers:** Whereas the Commission modified the thresholds from the Collocation Agreement to cap cumulative expansion with an ascertainable limit based on the structure's overall height, the proposed "clarifications" would effectively eliminate any ascertainable maximum expansion limits.

- **Concealment Elements:** Existing rules preserve concealment elements on all wireless towers and base stations against future modifications that would defeat the efforts invested by local communities to mitigate adverse aesthetic impacts from the equipment and support structure. The proposed rules would protect only "stealth" facilities, and only those concealment elements on those facilities specifically identified in the original siting approval as such. Moreover, some industry commenters further propose to ignore the express preservations in the original siting approval if it, for example, concerns overall height or would prevent the modification due to structural capacity issues. The end result sought in the Petitions and the industry comments is to do away with protections for concealment elements altogether.

- **RF Compliance Reports:** Existing Commission precedents recognize the legitimate local interest in local authority to check a proposed deployment's compliance with the Commission's RF exposure safety standards. This legitimate interest does not diminish after the initial approval and, in fact, grows stronger as collocations and network densification create ever-denser RF environments in local communities. Yet, the Petitions and some industry commenters urge the Commission to strip away this important step in the local review process.

These are just a few examples that illustrate how proposals in the Petitions and industry comments fundamentally alter or, in some instances, effectively eviscerate the existing rules. More than mere "clarifications," the Petitions urge the Commission to rewrite its existing rules.

B. To Amend the Rules, the Commission Must Follow the Same Process Used to Adopt Them

Although the Commission may exercise discretion over whether to proceed by rulemaking or adjudication, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[4]

Here, the Commission must follow the same procedures as it did in the *Infrastructure NPRM* because, as shown above, the proposed "clarifications" in the Petitions are in fact substantive amendments to existing rules. The Commission should reject the proposals in the Petitions and the industry comments. However, if the Commission desires to consider them, it must do so through a notice of proposed rulemaking as it did when it adopted the current regulations in 2014.

C. The Significant Changes Proposed by Petitioners Must Meet the High Standard Applicable to Retroactive Rules

Legislative rules, such as the new rules and substantive amendments to existing rules proposed in the Petitions, must ordinarily "be given future effect only" and may not be retroactive.[5] As articulated by the D.C. Circuit:

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[4] *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[5] *Chadmore Comm'cns Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997).

> [i]n the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. . . . The critical question is whether a challenged rule establishes an interpretation that changes the legal landscape.[6]

Given their inherent unfairness, both the U.S. Constitution and the APA strongly disfavor retroactive laws except in limited circumstances.[7]

Of course, not every agency action that "*only* upsets expectations based on prior law is retroactive."[8] But, under the secondary retroactivity doctrine, the Commission bears a heavy burden to balance the harm that flows from disrupted expectations against the salutary effects achieved by applying the new standard to preexisting conditions.[9]

Courts engage in a similarly searching review when the agency adopts legislative-type rules by adjudication. As the U.S. Supreme Court noted in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.[10]

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[6] *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (internal quotations and citations omitted).
[7] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1998).
[8] *See Nat'l Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (emphasis added) (internal quotations omitted).
[9] *See Nat'l Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).
[10] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Quasi-adjudicative powers should be reserved for "specialized problems" and "particular, unforeseeable situations," and "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[11] Here, the Commission faces at least three retroactivity problems that limit its authority to grant the relief sought by the Petitioners.

First, the Petitioners urge the Commission to adopt retroactive legislative rules. These proposed changes would impact which concealed facilities qualify for protection under Rule 1.6100(b)(7)(v) as well as the procedural steps required to protect all their concealment elements and therefore "attaches a new disability in respect to transactions or considerations already past . . . ."[12] New shot clock rules could alter whether a pending application is complete, incomplete or even duly filed in the first place.[13] Changes to the thresholds for a substantial change and requirements for a denial or conditional approval put recent decisions by local governments in legal jeopardy.[14] New "clarifications" that authorize applicants to proceed with their projects after a purported "deemed granted" notice unless the state or local government seeks an injunction within 30 days threatens to greenlight stale

[11] *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *see also Mason General Hosp. v. Secretary of Dept. of Health and Human Servs.*, 809 F.2d 1220, 1224–1225 (6th Cir. 1987).
[12] *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002).
[13] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Joint Comments of the City of San Diego, Cal. *et al.* at 22-23 (Oct. 29, 2019) [hereinafter "Western Communities Coalition Comments"].
[14] Western Communities Coalition Comments at 31-32, 37-39.

projects and extinguish claims local officials could not know they needed to make.[15] These, and other proposals, are quintessentially retroactive rules with questionable validity under both the Constitution and APA.

Second, even if some proposals in the Petitions created only secondary retroactive effects, the record shows that the harm to state and local governments (and their public at large) who relied in good faith on the existing rules far exceeds the expected benefits from the "clarifications" applied to existing facilities. Not one comment by the industry shows that failure to qualify as an eligible facilities request spells denial for a proposed modification. To the contrary, comments by

[15] *See* Western Communities Coalition Comments at 13, 16-19. Under the proposed deemed granted rule, applicants could theoretically revive projects that (a) the local agency did not act on and (b) the applicant did not preserve their rights by filing a claim in federal court. Conceivably, an applicant could attempt to provide a retroactive deemed granted notice and seek to modify a site without an application properly before the local agency.

municipalities[16] and industry[17] show their continued willingness to work together through the applicable local process to upgrade and expand existing facilities.

[16] *See* Western Communities Coalition Comments at 3-5, 23, 26; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nat'l League of Cities *et al.* at 7 (Oct. 29, 2019) [hereinafter "NLC *et al.* Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Beverly Hills, Cal. at 2 (Oct. 16, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Gaithersburg, Md. at 1 (Oct. 28, 2019) [hereinafter "City of Gaithersburg Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Chino Hills, Ca. at 2 (Oct. 28, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250,Comments of the City of Coconut Creek, Fla. at 2 (Oct. 28, 2019) [hereinafter "City of Coconut Creek Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Maryland Municipal League at 1 (Oct. 28, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Town of Kensington, Md. at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Chevy Chase Village, Md. at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Frederick, Md., at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nat'l Ass'n of Telecomm. Officers and Advisors *et al.* at 3 (Oct. 29, 2019) [hereinafter "NATOA *et al.* Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of New York, N.Y., at 2 (Oct. 29, 2019) [hereinafter "City of New York Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Town of Chesapeake Beach, Md., at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of SCAN NATOA at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Seattle, Wash., at 2 (Oct. 30, 2019) [hereinafter "City of Seattle Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Newport News, Va., at 2 (Nov. 13, 2019).

[17] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket

Comments by municipalities and the CWA also show that some proposed "clarifications"—especially the automatic authorization to begin construction—would threaten public health and safety.[18] Catastrophic injury and property damage would become more frequent under the new deemed granted remedy as the convoluted amendments to the shot clock rules make it nearly impossible to know when the shot clock starts, pauses or expires – uncertainty that decreases the likelihood that each project will receive the appropriate level of health and safety review, or *any* at all.[19] No marginal increase in deregulatory expedience can justify the extreme and potentially irreversible harms threatened by the proposals in the Petitions.

No. 19-250, Comments of American Tower Corporation at 2 (Oct. 29, 2019) [hereinafter "American Tower Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Competitive Carriers Association, WT Docket No. 19-250 at p. 2 (Oct. 29, 2019) [hereinafter "CCA Comments"]; Letter from John A. Howe Jr., Government Affairs Counsel WIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 3 (filed Oct. 2, 2019) [hereinafter "WIA Oct. 2 *Ex Parte*"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Wireless Infrastructure Association, at 2 (Oct. 29, 2019) [hereinafter "WIA Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of CTIA at 2 (Oct. 29, 2019) [hereinafter "CTIA Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Wireless Internet Service Providers Association at 4 (Oct. 29, 2019) [hereinafter "WISPA Comments"]; Letter from John A. Howe Jr., Government Affairs Counsel WIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 1-2 (Nov. 18, 2019).

[18] Western Communities Coalition Comments at 13, 16-19; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Comm. Workers, of Am. at 1-4 [hereinafter "CWA Comments"] ; NLC *et al.* Comments at 29-30; NATOA *et al.* Comments at 3-6; City of New York Comments at 3; City of Seattle Comments at 4; City of Gaithersburg Comments at 2.

[19] Western Communities Coalition Comments at 4, 12-13; CWA Comments at 2-3; City of Coconut Creek Comments at 1-2; NATOA *et al.* at 2.

Finally, the Commission cannot grant the retroactive relief requested by the petitions for declaratory ruling because the issues are hardly the special, unforeseeable circumstances that warrant a disregard for the quasi-legislative process. Almost all the relief requested in the Petitions appeared somewhere in the record before the Commission when it adopted the *2014 Infrastructure Order* and its existing Section 6409(a) rules.[20] Industry commenters also requested similar relief in the *RF Procedures Order*,[21] the *2009 Declaratory Ruling*[22] and the *Small Cell Order*.[23]

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[20] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 30 FCC Rcd. 31 at ¶ 197 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order"*] (declining to measure height increases by the last approved change); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of CTIA – The Wireless Association at 14 (Feb. 2, 2014) (asking FCC to determine that "physical dimensions" relates to measurable dimensions only and not visual effect); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of AT&T at 24 (Feb. 2, 2014) (asking FCC to determine that "physical dimensions" relates to measurable dimensions only and not visual effect); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of ExteNet at 6-7 (Feb. 2, 2014) (asking FCC to to clarify standards for application completeness); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of Crown Castle at 10-12 (Feb. 2, 2014) (asking FCC to require state and local governments to use an administrative process to review 6409 requests); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of PCIA at 42-46 (Feb, 2, 2019) (asking FCC to forbid conditional approvals, clarify concealment and camouflage requirements, and mandate administrative review).

[21] *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, WT Docket No. 97-192, 15 FCC Rcd. 22821, at ¶ 2 (Nov. 13, 2000) (declining to grant CTIA's petition to preempt all local government requirements to demonstrate compliance with the Commission's RF exposure standards).

[22] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, WT Docket No. 08-165, 24 FCC Rcd. 13994, at ¶ 39 (declining to impose a deemed granted remedy for failures to act within shot clocks; declining to mandate injunctive relief).

[23] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088 at ¶¶ 56, 121-24, 132 (Sep. 27, 2018) [hereinafter "*Small Cell Order*"] (requiring cost-based fees under an effective prohibition analysis; declining to mandate injunctive relief; and requiring local acts required to occur within the shot clock).

These issues are old hat. Neither the Petitions nor the industry comments provide any reason to believe that the "mischief" created by compliance with the existing rules would outweigh the strong aversion to retroactive rules by quasi-adjudication.[24]

If the Commission feels compelled to act on the issues raised in the Petitions, it should broadly leverage its resources to inform its decision making. In addition to public comments in response to a notice of inquiry or proposed rulemaking, the Commission should look to the BDAC for the industry perspective, the IAC for state, tribal and local government perspectives and the newly established bureau of economics for a cost-benefit analysis based on detailed and searching factual analysis.

II. THE RECORD DOES NOT SUPPORT NEW OR AMENDED RULES

Even if the Commission could proceed by declaratory ruling, which it cannot, the Petitions and industry commenters urge the Commission to adopt new rules and substantive changes to existing rules based on flimsy anecdotes and specious economic arguments.

Contributions to the record by municipal commenters expose the industry's anecdotes as misleading or false and other justifications as unsupported by fact. Put simply, there's no logical connection between the record as a whole and the "clarifications" sought by the Petitions.

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[24] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Notwithstanding these issues that the Petitions and industry comments allege significantly hamper infrastructure deployment, the Commission recently found that effective competition exists in the market. In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Twentieth Report, WT Docket No. 17-69, FCC 17-126 (Rel. Sept. 27, 2017. Findings that the system works well make it all the more difficult to explain why these tired issues threaten to undermine the statutory design.

A. Comments by Industry Members and their Allies Largely Regurgitate the Same Baseless or Unverifiable Anecdotes

As shown in comments by Western Communities Coalition and others opposed to the Petitions, the "evidence" offered by WIA and CTIA does not support their proposed rule changes. Most industry comments merely cited the vague, unverifiable or outright false statements in the Petitions without any new factual evidence or verifiable information to bolster WIA's or CTIA's factual allegations.[25]

Even commenters in a position to offer potentially unique perspectives on their interactions with state and local governments, like WISPA, ACT and Nokia, did little more than cross-reference the unsubstantiated allegations in the Petitions.[26] None offered any concrete and verifiable examples when they or any other affiliated entities experienced any delays or other problems like those alleged in the Petitions, and omit

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[25] *See, e.g.*, *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of AT&T at 7-8, 10, 12-13, 16-17, 20 (Oct. 29, 2019) [hereinafter AT&T Comments"]; WISPA Comments at 4–5, 7; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nokia at 5 (Oct. 29, 2019) [hereinafter "Nokia Comments"] (providing that "Nokia's experience is consistent with WIA's description" yet failing to cite any independent experience); CCA Comments at 5 (claiming "CCA members' experiences confirm that, in some situations, jurisdictions attempt to invoke loopholes and other ambiguities to impede or prevent deployment" yet failing to cite its members' own experience); CCA Comments at 8 (stating "CCA members have encountered similar situations" yet failing to cite *any* situations. All this should be cause for concern at the Commission. In past proceedings, the industry commenters bothered to at least present their own equally vague and unverified anecdotes about municipal misfeasance. The industry's collective willingness to simply cite back to the Petitions as their only factual support signals an expectation in the Commission's indifference to a meaningful evaluation of the record.

[26] *See* WISPA Comments at 4–5 (repeating WIA's and CTIA's claims); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of ACT at 5-6, 8, 10(Oct. 29, 2019) [hereinafter "ACT Comments"]; Nokia Comments at 2, 4-9.

any reference to delays and other problems created by their own agents and applications, as discussed below.

Although a few industry comments contained some new information, these anecdotes suffer from the same evidentiary defects as those in the Petitions. For example:

- Crown Castle repeatedly refers to alleged bad actors in ways that make identification virtually impossible. For example, the comments describe "a county in Texas," a "city in Michigan" and a "jurisdiction in California," but there are 254 counties in Texas, 276 cities in Michigan and 3,940 "jurisdictions" in California. Crown Castle's comments contain no less than eight such references.[27] These unidentifiable anecdotes as to the jurisdiction and a particular application cannot be verified, much less refuted—especially within the short comment cycle established by the Commission in this proceeding—and should not be considered as evidence by the Commission.

Even when industry commenters name the local governments they accuse, they often misrepresent the facts or assert claims that are outside the scope of Section 6409(a). For example:

- Crown Castle claims that the City of Seattle, Washington, takes "from two to four months" to schedule an appointment to submit an application.[28] As the City of Seattle demonstrated in their comments, this mischaracterization fails to account for the proactive steps the City has taken to accommodate eligible facilities requests. Further, the City notes that it has received no local complaints on its ability to meet shot clock requirements for EFRs, and has even been praised for its achievements in streamlining the processing and permitting of facilities.[29]

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[27] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Crown Castle at 5 (Oct. 29, 2019) [hereinafter "Crown Castle Comments"] ("one township in New York"); *id.* ("county in California"); *id.* ("town in Massachusetts"); *id.* at 7 ("jurisdiction in California"); *id.* at 14 (a "city in Michigan"); *id.* at 15 ("town in New York"); *id.* ("town in Utah"); *id.* at 21 n.51 ("county in Texas"); *id.* at 21 n.53 ("city in Virginia").

[28] *Id.* at 21 n.51.

[29] City of Seattle Comments at 2.

- Crown Castle claims that cities such as El Cajon in California "require pre-application appointments"[30] Crown Castle omits to mention a key fact that the preapplication conference in El Cajon is not specifically required for wireless applications and staff may waive the requirement upon the applicant's request.[31]

- WISPA claims that "New Berlin, Wisconsin wanted to charge a WISP $39,000 per year to rent space on a water tank . . . ."[32] WISPA appears to allege that such annual rent is excessive, but rental negotiations over access to municipal structures on private property are not regulatory requirements that could be preempted by Section 6409(a).[33] Moreover, there is no evidence in the record that establishes whether New Berlin's proposed rent is actually excessive or simply consistent with the marketplace for communications facilities.

The Commission requested facts and data.[34] The industry comments supplied rumor and conjecture. Taken together, neither the Petitions nor the comments in support lay out any factual justification for the proposed rules.

B. The Record Contains No Evidence Whatsoever that Public Health and Safety Reviews Unreasonably Delay Deployment

The Petitioners and industry comments generally support shot clock restrictions on permit reviews for public health and safety.[35] But there is no evidence

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[30] Crown Castle Comments at 21 n.51.

[31] *Planning Permit Application*, City of El Cajon, https://www.cityofelcajon.us/Home/ShowDocument?id=19061 (last visited Nov. 6, 2019) ("The purpose of a pre-application conference is to provide you an opportunity to review your project with City staff in a preliminary form to finalize submittal requirements and receive a cursory identification of potential issues. A pre-application is required unless waived by staff.")

[32] WISPA Comments at 9.

[33] *See 2014 Infrastructure Order* at ¶ 46 (providing that "Section 6409(a) applies only to State and local governments acting in their regulatory role and does not apply to such entities acting in their proprietary capacities.").

[34] *See Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CITA Petition for Declaratory Ruling*, Public Notice, 34 FCC Rcd. 8099, 8100 (Sep. 13, 2019) [hereinafter "Public Notice"].

[35] *See e.g.*, *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of ExteNet at 21 (Oct. 29, 2019) [hereinafter "ExteNet Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of T-Mobile at 13 (Oct, 29, 2019) [hereinafter "T-Mobile Comments"].

that these review processes cause unreasonable delay nor any justification for unnecessary limitations on the local review process.

In most jurisdictions with a two-step permitting process. The planning process addresses land use issues. The building department, which then focuses on generally applicable safety code review, does not review or issue permits until the planning department approves the application. When the planning department denies the application, the building department has no request for authorization to approve or deny because the application stops before it reaches the second phase. When planning departments approve applications, the most common cause for delay going forward, as shown in Western Communities Coalition's comments, are incomplete applications or the applicant's failure to pull *approved* permits ready to be issued.[36] The industry proposes unnecessary and untimely burdens on local agencies by requiring the reviews for compliance with generally applicable safety codes to occur before the application is deemed to qualify under Section 6409(a). This is wasteful of limited government resources and counterintuitive.

No industry commenter can provide a single example of a building department that delayed or failed to issue construction permits even though the prerequisite planning authority deemed that Section 6409(a) applied to the application. Whether a building department elects not to issue construction permits because the planning department fails to act or determines that the application is not subject to Section

[36] *See* Western Communities Coalition Comments at 4-5.

6409(a) cannot be resolved by subjecting the building department to a faster shot clock.

C. Specious Economic Arguments by Some Commenters Cannot Substitute for a Logical Connection between the Facts in the Record and the Rules Adopted

Several commenters attempt to bootstrap economic justifications for the *Small Cell Order* as support for new and substantial amendments to the Section 6409(a) rules.[37] The Commission should reject these apples-to-oranges comparisons.

Crown Castle argues that local permit fees above cost *anywhere* impedes deployment *everywhere*.[38] This is the same voluntary cross-subsidization rationale that has been widely debunked but occasionally resurrects itself inside the Beltway. The Commission should not repeat its mistake of relying on this faulty economic reasoning.

Furthermore, Crown Castle fails to show that any application fee charged by any local government exceeds the actual costs created by the application. Examples from their comments describe deposit and escrow account requirements, which by their nature result in a refund to the applicant for any unused funds.[39] Crown Castle's failure to show that it is required to pay fees above cost should come as no surprise since many states limit permit fees to some cost-based measure.[40]

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[37] *See, e.g.*, Nokia Comments at 9; T-Mobile Comments at 6; Crown Castle Comments at 19, 46; CTIA Comments at 4.
[38] Crown Castle Comments at 36.
[39] *Id.* at 35.
[40] Western Communities Coalition Comments at 89-90.

Additionally, the uncertainty posed by Petitioners' proposed changes to the rules is likely to increase costs, not alleviate them. The proposed "clarifications" advanced by Petitioners are more ambiguous than the existing rules they purport to make clear. For example, the proposal to allow the shot clock to begin upon any "good faith attempt" to submit an application invites disputes over the meaning of this term and case-by-case adjudication of each dispute. The uncertainty that Petitioners propose to inject into the regulatory process would routinely turn applications into shot clock disputes, which in turn increases the financial burden on the industry.

ACT | The App Association ("ACT") asserts the Petitioners' proposal would address the digital divide.[41] The Western Communities Coalition supports the admirable aim of addressing the growing and unconscionable inequality in access faced by citizens across the entire United States but particularly in rural and marginalized urban communities. As local governments and the organizations that represent them, the Western Communities Coalition is in a unique position to recognize the challenges that lack of connectivity provides because we face it ourselves as we serve our citizens and are often the first line of contact for individuals challenged by lack of access. However, ACT, like many other parties before it, fails to recognize a fundamental economic principle in its assertions.

The unfortunate fact is that for-profit commercial enterprises, especially those beholden to shareholders, are economically disincentivized from closing the digital divide (much less reducing) unless required to do so by the Commission. Rational

[41] ACT Comments at 5.

economic actors always seek to maximize profits.[42] Indeed, corporate law principles may prohibit alternative approaches.[43] So-called "must-serve" communities will still see investment dollars long before deployment filters slowly, if at all, to communities where the return over time does not justify the capital expenditure. Other industry members and the Commission have advanced similar digital divide arguments in other proceedings to preempt local authority perceived as barriers but, despite the relief granted by the Commission, the digital divide persists.[44] This justification is both wrongheaded and worn thin.

Petitioners' undeveloped economic arguments are no substitute for the reasoned economic analysis prescribed by the public notice of this proceeding.[45] The Commission lacks the necessary information to determine whether the proposed rules will be consistent with the Commission's own policies. As described above, the FCC now has an office of economic analysis that could undertake the necessary rigorous examination of the role of regulatory costs in deployment. Rather than rely on industry's conclusory assertions as the basis for the proposed changes to the rules, the FCC should conduct a reasoned examination of the economic principles implicated.

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[42] Letter from Tillman L. Lay to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Sep. 19, 2018).
[43] *See, e.g.,* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). *See also,* Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, Faculty Scholarship Series. 1384 (2008) https://digitalcommons.law.yale.edu/fss_papers/1384.
[44] *See, e.g.*, *Small Cell Order* at ¶ 63.
[45] *See* Public Notice at 8100 (inviting interested parties to submit factual data and economic analysis).

While economic considerations may influence whether the Commission should act, the industry does not seriously address the costs and benefits associated with the proposals in the Petitions. The Commission has resources at its disposal to develop concrete facts from diverse viewpoints through a more thoughtful process. Reliance on the specious and conclusory economic arguments in the industry comments would be misplaced.

D. Evidence in the Record Exposes the Proposed Rules as Unnecessary and Counter to the Public Interest

Local government comments show that, contrary to the false light cast by the Petitions and reflected in industry comments, local governments understand the existing rules, process eligible facilities requests within a reasonable time and work with applicants who seek modifications not covered by Section 6409(a). In fact, WIA even acknowledges that "most local governments around the U.S. have been helpful and are working with industry to ensure that their constituents can benefit from better broadband connections."[46] Not one industry comment named a local government who refused to process an application because it lacked a specialized process tailored to the Commission's rules. Not one industry comment offered any concrete example in which a local government unreasonably delayed approval or denial. Not one industry comment showed that Section 6409(a)'s scope must be expanded to meet their needs because local governments refuse to approve any modification unless by federal force.

[46] WIA Oct. 2 *Ex Parte*.

Rather, the facts show that the current rules, and the processes employed by local governments to operationalize those rules, work reasonably well. In the limited time afforded to prepare comments and replies in this proceeding, a partial survey among the public agencies and local government associations in this coalition concluded that: (1) local governments rarely deny eligible facilities requests; (2) when applications do not qualify as eligible facilities requests, local officials work with applicants to approve the modifications through the discretionary process; (3) local officials almost always meet shot clock timeframes but approved permits often sit ready to issue for months on end; and (4) the primary factor affecting timely approval or denial is how long it takes an applicant to provide a complete application.

As addressed above, both ACT's and American Tower's references to the impact that these rules supposedly will have on the public interest is grounded in a misunderstanding of fundamental economic principles. The proposals advanced by Petitioners will not serve the public interest, but they will harm localities and their citizens across the country.

Furthermore, local governments understand that connectivity has become a fundamental necessity for participation in public life and have stepped up to the challenge of connecting the unconnected, yet the digital divide remains a fundamental concern. Local governments work with applicants to approve their projects regardless of whether the FCC mandates it because infrastructure investment has the potential to help reduce the impacts of problems like the digital divide. However, the proposals advanced by Petitioners do nothing to ensure that any

underserved areas actually gain service. The proposals advanced by Petitioners will not in any way ensure an increase in service in underserved areas and do not promote the public interest. Indeed, the industry proposals rest upon the assumption that by further preempting local control the Commission will be sprinkling fairy dust on the wireless industry, magically resulting in more deployment in underserved areas. The Commission should not perpetuate this fantasy.

Another aspect of the digital divide not addressed by industry commenters is the community benefits of local perspectives in siting wireless deployment. Local officials are in the best position to address local issues because they are also members of their communities. The principle of local control embraced by this nation since its beginnings recognizes that the people who live, work, and play in a given locality are the best positioned to make local decisions about how to organize and build the places that they call home. Local officials have a unique understanding of where service is most needed and can work with providers to affect change at a neighborhood level. This local knowledge is a key, yet thus far underappreciated component of local control, with significant implications for ensuring that as broadband is extended nationally, no one is left behind. Further, local control allows individual communities to make choices to uplift their communities, ensuring that the quality of life for their residents is positively impacted by proposed facilities.

III. SHOT CLOCK ISSUES

Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the

industry commenters stake positions that are counterproductive and dangerous. The Commission should reject the proposed "clarifications" and retain the established rules, timeframes and remedies.

A. Proposed "Clarifications" to the Section 6409(a) Shot Clock are Counterproductive to Clear and Objective Standards

Industry comments show that the proposed "clarifications" will only make it more difficult for local officials and applicants to agree on when the shot clock begins, tolls and ends. Moreover, these proposals discourage the parties from collaboratively resolving disputes and encourage applicants to engage in self-help rather than address their concerns through the courts.

Crown Castle's comments illustrate how the proposed "clarifications" would exacerbate the conflicts and confusion it purports to avoid.

Submittal. Crown Castle urges the Commission to allow the shot clock to start when the applicant makes a good faith attempt through any reasonable process because, it claims, some local governments fail or refuse to recognize an eligible facilities request notwithstanding the existing rules that require the applicant to identify their project as such in writing. If the local officials described in Crown Castle's comments cannot recognize an eligible facilities request when identified as such through their own processes and on their own forms, how does Crown Castle expect a looser standard to help? The likelihood for confusion is even greater when a dispute arises over whether an application or review process complies with the Commission's rules.

Incomplete Notices. Crown Castle suggests that incomplete notices should contain, in addition to a cross reference to the "code provision, ordinance, application, instruction, or otherwise publicly-sated procedures that require the information," an explanation for why each item deemed incomplete "relate[s] to the EFR determination."[47] Requirements such as these place an outsized burden on local government staff with busywork that will needlessly drive up review costs and delay turnaround times. Moreover, these requirements would ultimately hinder deployments as applicants are required to pay higher pass-through reimbursement costs and wait longer to receive direction on incomplete applications. Thus, the requirements impose obligations on local governments to produce unnecessary work product for which applicants ultimately must pay and wait.

Real solutions to delays in the initial completeness review phase should focus on incentives for applicants to provide complete applications in the first instance. Analysis conducted in response to the public notice shows that localities process complete applications to a decision within an average of 26 days but spend on average 67 days waiting for applicants to respond to incomplete notices. Some localities reported applications that remained incomplete *without a resubmittal from the applicant* for more than 377 days.

Denials. Crown Castle's proposal to disregard denials that do not contain certain details will lead to "gotcha" situations in which the applicant can sit on a denial they find insufficient and then, rather than address their concerns with the

[47] *See* Crown Castle Comments at 24–25.

local government or (as the Act directs) to a court, simply respond with a deemed approved notice and then proceed with their construction. Although Crown Castle claims that the rule is needed to ensure applicants know the reason for the denial, a denial could be due for only one reason: the application does not meet the criteria for an approval under the Commission's codified rules.

Conditional Approvals. Crown Castle's proposal to treat conditional approvals as denials creates a bizarre situation in which an affirmatively approved application licenses the applicant to construct something not authorized by the approval. Conditional approvals serve an important purpose in the local review process. Especially when local officials must act within a constrained timeframe, a conditional approval allows for an approval notwithstanding the fact that the project may contain certain inconsistencies. For example, if an application tendered as an eligible facilities request requires additional concealment to match the existing concealment elements, a condition to paint screens or add faux branches to the project creates a path to approval in a timely manner.

Under Crown Castle's proposal, it would be free to disregard those conditions and deploy its facilities without the necessary concealment merely because the requirement appeared as a condition in the authorization. This makes no sense. This proposal will cause confusion as to what a permit authorizes and create incentives to reflexively deny applications with instructions to the applicant to try again.

Taken together, these "clarifications" make it harder to know when the shot clock starts, when it tolls and when it ends. These proposals and others like them will sow confusion and engender conflict. The Commission should reject them.

B. The Commission Should Encourage Voluntary Preapplication Conferences, Not Punish Local Governments that Choose to Offer Them

Preapplication conferences provide a structured and focused forum for applicants and staff to hash out their respective concerns and questions about an incipient project. In other words, preapplication conferences provide an opportunity to put the applicant and the local government in the same room, at the same time and on the same page as to which rules apply and how the Commission's limitations, if any, should be applied. This leads to faster and less contentious application reviews.

Some industry commenters argue that the Commission should preempt preapplication conferences as "largely or entirely unnecessary" for eligible facilities requests.[48] However, these same commenters argue that the Commission must issue "clarifications" to resolve controversies and misinterpretations over everything from terms with codified definitions to when the shot clock starts and ends.[49] The rules cannot vacillate between being unambiguous and ambiguous based on when it would serve the industry's argument.

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[48] *See* Crown Castle Comments at 21; *see also* WIA Comments at 8; WISPA Comments at 5; T-Mobile Comments at 17.

[49] *See, e.g.*, Crown Castle Comments at 15–16 (arguing that Rule 1.6100(b)(7)(ii) "should be clarified"); WIA Comments at 10-12 (arguing that Commission must clarify various definitions such as "concealment element"); WISPA Comments at 6 (arguing that Commission should clarify what constitutes a substantial change); T-Mobile Comments at 8 (arguing that Commission should clarify the definition of substantial change).

As the Commission acknowledged in its *2014 Infrastructure Order*, its rules did not aim to cover all possible circumstances.[50] These ambiguities serve important public policy purposes such as the regulatory humility to know when the agency may not be able to anticipate consequences from its actions.[51] Moreover, in instances where the Commission acknowledged potential ambiguities, it encouraged and expected applicants and local authorities to work through the issues together.[52]

Preapplication conferences *implement* this vision for open communication and collaboration. The Commission should not place burdens on this useful process in communities that choose to adopt it.

C. Deemed Granted Remedy Issues

While some of the industry's proposals are merely unjustified, others are also unreasonably dangerous. The notion that a deemed-granted remedy automatically authorizes construction "on day 61" exposes the public to unregulated utility construction and excavation on an unprecedented scale.[53] Given the Commission's and the industry's expectation that 5G will involve several hundred thousand new deployments in dense deployments and close proximity to where people live, work

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[50] *See 2014 Infrastructure Order* at ¶ 221 ("Beyond the guidance provided in this Report and Order, we decline to adopt the other proposals put forth by commenters regarding procedures for the review of applications under Section 6409(a) or the collection of fees."); *id.* at ¶ 244 ("With regard to certain other issues, after review of the record, we decline to take action at this time.").

[51] *See 2014 Infrastructure Order* at ¶ 261 ("Beyond these procedural requirements, we decline to enumerate what constitutes a "complete" application. We find that, as some commenters note, State and local governments are best suited to decide what information they need to process an application. Differences between jurisdictions make it impractical for the Commission to specify what information should be included in an application.").

[52] *See id.* at ¶ 214 (anticipating "that over time, experience and the development of best practices will lead to broad standardization" in local requirements).

[53] Comments by the Communications Workers of America illustrated the death and property destruction that accidents in utility deployments can cause.

and travel, it is difficult to understand how the Commission (or the industry) could even consider automatically authorized construction under any circumstances.

1. Industry Comments Display Alarming Disregard for Critical Public Health and Safety Oversight

The industry's zeal for preemption threatens everyone's health and safety.[54] Dangerous proposals to authorize construction without the local public safety oversight provided by the construction and excavation permit process should alarm the Commission.

Some industry commenters complain that state and local governments require a permit before construction or work in the public rights-of-way may commence.[55] As Western Communities Coalition's comments showed, ministerial permit processes rarely cause a delay in deployments, and often sit ready to issue for months while the permittee is not ready to move forward with their project.[56] These permit requirements protect communications workers and the public at large.

Ministerial permits, like construction permits, excavation permits, traffic control permits and the like, guard against preventable harm from unsafe structures and/or construction activities. In addition to checks for compliance with generally applicable health and safety codes, local officials ensure that the contractors hold required licenses and certifications, provide adequate insurance and adhere to appropriate safety protocols. When the work impacts the public rights-of-way, local

[54] CWA Comments at 1–2 ("Applying the proposed Section 6409(a) shot clock and deemed granted remedies to all authorizations would endanger public and worker safety.").
[55] *See, e.g.*, T-Mobile Comments at 12.
[56] Western Communities Coalition Comments at 4-5.

officials also commonly require traffic control plans to mitigate hazards to other users and performance bonds to ensure that affected areas are properly restored.

Infrastructure deployment often entails dangerous work. Comments by CWA illustrate how job site accidents result in extensive property damage, injuries and even death.[57] These tragedies would likely become more common if providers could skip health and safety review processes altogether.

Risks would not be confined to the construction phase. Although commenters in related proceedings point out that towers infrequently fail, compliance with rigorous engineering standards plays a crucial role in structural stability.[58] Without government oversight, providers and contractors may be tempted to cut corners. Any completed facilities with latent code violations would pose a continual threat to public health and safety, especially if later overloaded with heavy equipment as happened in the 2007 Malibu Canyon Fire.[59]

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[57] *See* CWA Comments at 2. CWA's comments also highlight the elevated risks associated with construction and excavation within the public rights-of-way. Ministerial encroachment permits also create records to locate utilities above and below ground, which in turn helps other users avoid them as they deploy and maintain their own facilities.

[58] *See, e.g.*, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, Reply Comments of the Wireless Infrastructure Assoc. at 22–23 (Jul. 17, 2017) ("[R]igorous Class II standards already ensure towers have the necessary strength to survive damaging conditions.").

[59] *See* Knowles Adkisson, *$12 million settlement reached in 2007 Malibu Canyon fire*, Malibu Times (Sep. 19, 2012), http://www.malibutimes.com/news/article_e115f3aa-02e3-11e2-811c-0019bb2963f4.html. Utility equipment, including macro facilities, appear to play an increasingly common role in wildfires. *See, e.g.*, Candice Nguyen, *PG&E likely sparked nearly 2,000 CA fires, 30% involved equipment failure*, FOX KTUV (Nov. 12, 2019), https://www.ktvu.com/news/pge-likely-sparked-nearly-2000-ca-fires-30-involved-equipment-failure; Joseph Serna, Southern California Edison strikes $360-million settlement over wildfires and mudslide, LA Times (Nov. 13, 2019), https://www.latimes.com/california/story/2019-11-13/southern-california-edison-settles-public-agencies-wildfires-mudslides; John Gregory and Carlos Granda, *Maria Fire: Blaze near Santa Paula jumps to 9,000, some evacuations lifted*, ABC7 (Nov. 1, 2019), https://abc7.com/some-evacuations-remain-for-maria-fire-near-santa-paula/5663902/.

And these permits do not just address public health and safety issues related to structural stability. Placement of the pole and ancillary equipment boxes need to protect traffic site lines and pedestrian movement patterns. Battery back-up often entails review of the manner in which hazardous materials are handled. Maintenance requirements for the construction site ensures that obstructions are not left in traffic during and after construction. There are many public safety issues that must be addressed through local permitting aside from tower structure issues.

The Commission should reject proposals to authorize construction without all applicable health and safety permits. Marginally faster deployments cannot justify the increased threat to property and human life by unregulated construction and excavation.

2. If the Commission Authorizes Unpermitted Construction, It Must Adopt Limitations and Conditions on Such Work to Protect the Public from Unreasonably Dangerous Deployments

To be clear, the Commission should not, under any circumstances, adopt proposals like those in the Petitions that allow for unregulated construction activities. Such an unprecedented authorization to commence construction without prior health and safety review would expose the public to enormous risks.

However, if the Commission authorizes applicants to engage in such hazardous conduct, the Commission *must* take additional steps to ensure that applicants think twice before they act. Additional rules would be necessary to ensure applicants still comply with public health and safety regulations; to hold the applicant responsible for the harms they cause; to ensure compensation is available to those harmed; and

to enable state and local officials and other adversely affected persons or entities to act when unpermitted facilities threaten public health and safety. At a minimum, these additional protections should include:

- ***Non-applicability to ROW Facilities:*** A deemed grant does not authorize an applicant to commence construction in any utility easement or public rights-of-way. Unregulated construction is unreasonably dangerous anywhere, but it is especially so in dynamic environments such as streets and highways, where construction work would be in close proximity to pedestrians, vehicles and other properties.[60]

- ***Assumption of Risk:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be deemed to assume any and all risks (known or unknown, foreseeable or unforeseeable) that may arise in connection with the facility's construction, operation and removal.

- ***Indemnification:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to indemnify, protect and defend the state or local government against any and all liabilities or claims of liability that may arise in connection with the facility's construction, operation and removal.

- ***Insurance:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to provide the state or local government annual certificates of insurance that list the state or local government as an additional insured. Unregulated construction will eventually cause harm.

- ***Franchise and Lease Requirements:*** The authorization conveyed by the deemed grant does not extend to any franchise or lease obligation for the occupation of rights-of-way. Any applicant that proceeds with construction without the required franchise or lease authorization for such occupation shall be subject to removal as an unlawful encroachment.

- ***Removal Bond:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to provide the state or local government with a performance bond equal to the estimated cost to remove the facility.

[60] One coalition member described the proposal as "stone-cold crazy" as applied to the public rights-of-way, and the authors of these Reply Comments agree.

- ***Attorneys' Fees and Costs:*** The plaintiff in any action against the applicant shall be entitled to recover all its attorneys' fees and other costs if the deemed granted notice is found to be defective or applicant is found to have violated any generally applicable regulations for public health and safety in connection with the construction or operation of the facility.

D. Local Application Requirements Are Critical Elements for, Not Barriers to, Section 6409(a) Approval

Industry comments generally vent their frustration with local requirements to provide information needed to issue permits for covered requests but not necessarily directly related to whether Section 6409(a) mandates approval.[61] However, such requirements naturally follow from the Commission's own rules. Local governments must act within 60 days but cannot do so without complete information.

Complete information includes documentation required for all phases in the entitlement and permit issuance process—not just for the determination as to whether Section 6409(a) mandates approval or not. The Commission suggested in its *2014 Infrastructure Order* that such requirements would be advisable.[62] Indeed, many industry commenters urge the Commission to expand the shot clock to include these additional permit reviews, which would be impossible without the ability to require complete information up front.

The Commission's existing rules need no clarification and further limitations urged by the industry comments would frustrate state and local government capacity to act within the presumptively reasonable times set by the Commission. The

[61] *See, e.g.*, Crown Castle Comments at 27–30; Nokia Comments at 7; T-Mobile Comments at 17; AT&T Comments at 19.
[62] *See 2014 Infrastructure Order* at ¶ 214 n.595.

following subsections respond to particular requirements assailed in the industry comments.

1. RF Compliance Reports

Many industry commenters complain that some local governments require applicants to demonstrate that the facility, once modified, will be compliant with the Commission's RF exposure rules.[63] Industry commenters urge the Commission to preempt local authority to even *ask* about an applicant's planned compliance with these generally applicable health and safety standards.[64]

As noted in Western Communities Coalition's comments, local requirements to demonstrate compliance with the Commission's RF exposure rules are both reasonable and consistent with the Commission's precedents that recognize the legitimate local interest in safety.[65] Moreover, these modest compliance checks are an effective and efficient means to identify instances where proposed modifications—and even some *existing* facilities—do not comply with the Commission's rules. For example:

- ***City of Agoura Hills, California:*** AT&T applied for a Section 6409(a) modification to a rooftop site. The project plans showed an existing microwave backhaul antenna operated by AT&T, but the RF compliance report did not account for those emissions in its calculations.[66] This discrepancy stemmed from the fact that AT&T never sought any prior authorization for the microwave antenna. This not only violated the Agoura Hills Municipal Code[67]

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[63] *See e.g.*, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WIA Petition for Declaratory Rulemaking, WT Docket No. 17-79 at 22 (Aug. 27, 2019) [hereinafter "WIA Dec. R. Petition"].
[64] Crown Castle Comments at 29-30.
[65] *See* Western Communities Coalition Comments at 69-72.
[66] *See AT&T Radio Frequency Safety Survey Report Prediction (RFSSRP)*, EBI Consulting (Apr. 30, 2018).
[67] *See* AGOURA HILLS, CAL. CODE § 9661.2.D.

but also illustrates how unpermitted facilities contribute to inaccurate RF exposure compliance assessments.

- ***City of Santa Monica, California:*** AT&T applied for an eligible facilities request to collocate Sirius XM facilities with AT&T's existing facilities. However, the RF compliance report commissioned by AT&T concluded that "AT&T MPE% at this level is *472.73% of General Population Standard*. Mitigation required."[68] AT&T's independent consultant recommended, with concurrence by the city's own independent consultant, that physical barriers be installed around all three antenna sectors to preclude access by general population members were necessary for compliance with the Commission's rules.[69] The *existing* emissions by a single site operator exceeded the maximum permissible exposure by nearly five times the Commission's limits and the proposed collocation would exacerbate such noncompliance but for the city's basic RF evaluation requirement.

- ***City of Thousand Oaks, California:*** An RF compliance report submitted with a Verizon application for an eligible facilities request to add new service bands to its existing rooftop site disclosed that "[a]t the nearest walking/working surfaces to the Verizon antennas, the maximum power density generated by the Verizon antennas is approximately *7,431.95 percent of the FCC's general public limit* (1,486.39 percent of the FCC's occupational limit)."[70]

- ***City of Richmond, California:*** Staff report several instances in which RF compliance reports submitted with eligible facilities requests raised serious public health and safety concerns. Some examples include:

    - An RF compliance report submitted with a T-Mobile application as an eligible facilities request to modify an existing rooftop wireless site concluded that its site created exposures equal to "*2,095.8 percent of the FCC's general public limit*"[71] in areas accessible by general population members. Window washers, HVAC workers, roofers, building maintenance personnel and other non-wireless industry personnel were at particular risk because they could not control their exposure in the areas where their work would naturally take them.

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[68] *See Radio Frequency Emission Compliance Report*, GCB Services (Jan. 15, 2019) (emphasis added).
[69] *See id.*
[70] *Radio Frequency – Electromagnetic Energy (RF-EME) Jurisdictional Report*, EBI Consulting (May 13, 2019) (emphasis added).
[71] *Radio Frequency – Electromagnetic Energy (RF-EME) Compliance Report (L600)*, EBI Consulting (July 26, 2019) (emphasis added).

- An RF compliance report submitted with an AT&T application as an eligible facilities request to modify an existing rooftop wireless site concluded that its site created exposures equal to "*2082.4% FCC General Population MPE Limit*"[72] in areas accessible by members of the general population who cannot control their exposure in the areas where their work would naturally take them.

- An RF compliance report submitted with a different T-Mobile application as an eligible facilities request to modify a different existing rooftop wireless site concluded that the combined emissions from the modified T-Mobile facilities plus all other collocated emitters would create exposures equal to 2,839.1% of the uncontrolled/general population limits at the main roof level.[73]

- An RF compliance report submitted with a Sprint application as an eligible facilities request to modify an existing rooftop wireless site concluded that emissions from the site required mitigations over almost the entire rooftop because the exposures exceeded the *occupational* limits within 11 feet from the antennas.[74] Whereas barriers or floor striping were needed, Sprint had not undertaken such mitigations with its existing deployments on this rooftop.

- ***City of Encinitas, California:*** An RF compliance report submitted by Verizon Wireless in connection with an eligible facilities request to modify a rooftop installation disclosed that the post-modification emissions would be 8,369.0% of the uncontrolled/general limit in areas that can be accessed by members of that class.[75] These emissions would impact areas on the rooftop accessible to general population members, the most vulnerable class.

In all the illustrative cases mentioned above, the cities ultimately approved all the applications because city staff worked with the applicant to determine the appropriate mitigations needed to achieve compliance with the Commission's RF exposure rules. In many instances, the mitigations may be routine signage and access

[72] *Electromagnetic Energy (EME) Exposure Report*, OSC Engineering (June 18, 2018) (emphasis added).
[73] *Radio Frequency – Electromagnetic Energy (RF-EME) Compliance Report (L600)*, EBI Consulting (June 28, 2019).
[74] *Statement of Hammett & Edison, Inc., Consulting Engineers*, Hammett & Edison, Inc. (Sep. 17, 2018).
[75] *Radio Frequency Electromagnetic Fields Exposure Report*, Dtech Communications (Feb. 13, 2019).

control protocols. Indeed, the applicant's own consultants often recommend these mitigations as necessary for compliance. Benefits to public health and safety far outweigh the relatively modest additional burden on applicants.

Unfortunately, these illustrative cases are neither outliers nor anomalies. More and more, local governments see evidence that facilities are either not deployed in accordance with the approved plans or are modified without approval. Even for properly permitted facilities, instances in which the applicant seeks approval with an RF report that affirmatively concludes the modified facility will not comply with the Commission's RF exposure rules signal a dangerous indifference by the industry—both to their compliance obligations to the Commission and to public health and safety at large. Especially with respect to existing noncompliance before any proposed modification, these illustrative cases show that the local review process plays an important role in ensuring that the facilities maintain actual compliance with standards intended to protect the public from excessive exposure to RF emissions.

Finally, the Commission should consider the efficiencies created by local RF compliance requirements. All FCC-licensed or authorized wireless facilities must comply with the Commission's RF exposure rules, but the Commission's staff lacks the resources to individually review all such facilities. Even facilities categorically exempt from routine compliance evaluations may be noncompliant due to localized conditions. By respecting the legitimate local interest in compliance evaluations, the Commission disperses the administrative burden among the public agencies with the motivation and local knowledge best suited for the task. Local governments that

choose to check for compliance with the Commission's rules may do so and, in those jurisdictions, potential issues that arise from local conditions (like multiple-emitter environments or areas made accessible by other development projects) will be more readily mitigated.[76]

Local requirements to demonstrate compliance with the Commission's RF exposure rules serve a legitimate local interest and promote public health and safety through an effective and efficient process. Benefits from these requirements far outweigh any burdens allocated to the applicant. Accordingly, the Commission should decline to preempt local requirements to show compliance with federal RF standards.[77]

2. Equipment Inventories

WIA and its industry supporters complain that local governments should not be permitted to require equipment inventories for eligible facilities requests.[78] Yet WIA's own guidance to "jurisdictions needing assistance in complying with Federal timeframes to act on Eligible Facilities Requests" recommends that local

[76] Documented compliance checks also bolsters public confidence in the infrastructure deployment process, which has come under increasing scrutiny. *See, e.g.*, Ianthe J. Dugan and Ryan Knutson, *Cellphone Boom Spurs Antenna-Safety Worries*, WALL ST. J. (Oct. 2, 2014 at 7:37 PM), https://www.wsj.com/articles/cellphone-boom-spurs-antenna-safety-worries-1412293055; Scott James, *Warnings, but Not Really, on Cellphone Antennas*, NYT (Aug. 18, 2011), https://www.nytimes.com/2011/08/19/us/19bcjames.html.

[77] Multiple commenters note that the Commission's inaction on updates to its RF exposure guidelines creates issues on a local level as citizens with questions about the health and safety of these deployments turn to their local representatives for assistance. *See, e.g.*, League of Oregon Cities Ex parte (Oct. 23); Coconut Creek Comments at 1; City of Seattle Comments at 3–4; NLC *et al.* Comments at 9. We therefore respectfully join with NLC *et al.* in requesting that the Commission conduct a meaningful evaluation of these issues. NLC *et al.* Comments at 9 n.33.

[78] WIA Petition for Declaratory Ruling at 22; *see also* Crown Castle Comments at 29-30.

governments ask for equipment specifications.[79] Equipment inventories help state and local governments perform the reviews required for wireless facility deployments within the timeframe mandated by the Commission.

Without an equipment inventory, local officials cannot fully evaluate applications tendered for approval as an eligible facilities request for compliance with Section 6409(a).[80] As a threshold matter, Section 6409(a) does not cover facilities illegally deployed and equipment inventories help local officials compare the facilities approved to those actually deployed.[81] Moreover, the substantial-change analysis requires a comparison between existing and proposed equipment, which requires an equipment inventory and specifications. For instance, Rule 1.6100(b)(7)(iii) asks whether any pre-existing ground cabinets are less than ten percent (10%) larger in height or overall volume than the proposed cabinets. Unless the applicant provides the requisite specifications for the *existing* cabinets, the local government could not possibly determine the relative height or volume for the *proposed* cabinets as required by the rules.[82]

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[79] *See Wireless Facility Siting: Section 6409(a) Checklist*, WIA (Jun. 19, 2015), https://wia.org/wp-content/uploads/Advocacy_Docs/6409a_Siting_Checklist.pdf.

[80] *See, e.g.*, 47 C.F.R. § 1.6100(b)(7)(iii) (requiring reviewing authorities to consider the height and volume of existing equipment cabinets on the ground to those proposed to be added).

[81] As described elsewhere in these and other comments, unauthorized deployments occur and are frequently discovered only after the applicant requests a modification by right under Section 6409(a). *See* Western Communities Coalition Comments at 87-88.

[82] Likewise, some local governments would be rudderless to evaluate whether a proposed eligible facilities request involved more than a "standard number of cabinets" for the technology involved if they could not ask questions about what equipment was needed for what technologies. Whether the provider's "need" for a particular facility matters or not, the Commission should not discourage state or local government officials from inquiries about the facilities necessary to provide a particular service.

Even if the Commission's rules themselves did not effectively mandate an equipment inventory, the proposed shot clock rules and local police powers provide an independent justification to require them. As the Commission recognizes, local governments retain authority to evaluate projects for compliance with building and safety codes and deny non-compliant applications.[83] Whether a project meets these standards may require a structural analysis that accounts for the dimensions and weight of each piece of equipment. Under the Commission's existing Section 6409(a) rules, local governments may not toll the shot clock for incompleteness if the information requested is not a publicly-stated requirement.[84] Moreover, under the industry's proposed rules, local building officials must complete their review within 60 days.[85]

Thus, in order for local officials to (1) evaluate compliance with building and safety codes; (2) preserve authority to request information relevant to this determination; and (3) routinely evaluate projects from start-to-finish in 60 days or fewer, local governments must be allowed to require full equipment inventories.[86]

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[83] *See 2014 Infrastructure Order* at ¶¶ 188, 202, 231.
[84] *See id.* at ¶ 260.
[85] *In re Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment*, CTIA Petition for Declaratory Rulemaking, WT Docket No. 17-79, WC Docket No. 17-84 at 19 (Sep. 6, 2019) [hereinafter "CTIA Petition"].
[86] Tolling agreements do not solve this problem. If local governments cannot inquire about existing equipment, it must rely on other sources, which may not be accurate if the site operator deployed equipment or improvements other than those specified in previously approved plans and/or structural calculations. Moreover, tolling agreements depend on *agreement* between the parties and an applicant's incentive to be reasonable diminishes as its prospects to deploy under a "deemed grant" increases.

Any other rule or interpretation would undermine the Commission's express commitment to public health and safety.[87]

3. Property Owner Authorization

As explained in Western Communities Coalition's comments, state and local governments have a legitimate interest in documentation to show an applicant's authorization to receive a development approval that runs with the land.[88] Contrary to Crown Castle's comments, the relationship between the carriers, infrastructure providers and property owners at a communications site on private property is not so unique to the wireless industry that it warrants special treatment.[89]

Many multi-tenant commercial environments are managed and operated by firms with a long-term lease and the right to sublease or license space to third parties. Moreover, just as the property owner typically does not own the tower or transmission equipment, long-term commercial leases often carve out "trade fixtures" as the tenant's personal property rather than improvements to the land.

The routine fact that the applicant, the permittee and the property owner may not be the same persons or entities is reflected in many development codes.[90] These relationships are so commonplace in development projects that most local governments inquire about them on any application—not just for wireless facilities.[91]

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[87] *See 2014 Infrastructure Order* at ¶¶ 188, 202, 214 n.595.
[88] Western Communities Coalition Comments at 88-89.
[89] *See* Crown Castle Comments at 27–28.
[90] *See, e.g.*, SAN DIEGO, CAL., CODE § 112.0102(a); TACOMA, WASH. CODE § 13.05.047.B; PLEASANTON, CAL. CODE § 18.124.020.
[91] *See, e.g.*, *Form DS-3032: General Application*, San Diego Development Services (Jan. 2019), https://www.sandiego.gov/sites/default/files/legacy/development-services/pdf/industry/forms/ds3032.pdf (distinguishing between the property owner, permit holder and applicant); *Master Application Form*, Glendora Planning Dept. (Jan. 1, 2018),

In addition to general misrepresentations about the requirement, some industry commenters misstate material facts in their effort to twist them to suit their narrative. For example, CTIA alleges that a Colorado jurisdiction failed to act on a wireless provider's request to relocate certain equipment on a rooftop by seeking a lease for the airspace above the street where one sector would overhang.[92] Based on the general description by CTIA, the City of Boulder, Colorado, suspects that CTIA's vague allegation refers to an application for a facility within its jurisdiction.[93] If so, the allegation is completely unfounded.

The City of Boulder received an application that matches CTIA's description but determined that Section 6409(a) did not apply because it would involve deployment outside the current site area and approval would effectively compel a lease between the city and the applicant.[94] The applicant's proposed deployment on the building facade would have projected over the property line and into the city's rights-of-way in a manner prohibited by local law.[95] Rather than outright deny the application, city staff notified the applicant within the 60-day shot clock that the application could not be approved as requested and offered to work with the applicant to develop an alternative location on the rooftop to avoid the encroachment issue.[96]

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http://www.cityofglendora.org/home/showdocument?id=5831; *Application Form*, Concord Planning Division (Aug. 2017), https://www.cityofconcord.org/DocumentCenter/View/185/Application-Form-PDF; *Land Use Application Form*, Oxnard Planning Division, https://www.oxnard.org/wp-content/uploads/2016/03/Land_Use_Application_Form_11.13-1.pdf (last visited Nov. 8, 2019).

[92] CTIA Petition at 11. CTIA did not name this jurisdiction.

[93] Aff. of Edward Stafford, Dev. Review Manager for Pub. Works, City of Boulder, Colo. (Oct. 28, 2019).

[94] *Id.*

[95] *Id.*

[96] *Id.*

The city's notice informed the applicant that it lacked the property rights necessary for its project but did not insist that the applicant actually enter into an agreement with the city. The city recently received a submittal from the applicant which is currently under review.[97]

In this case, the actual facts show that the city acted in a timely, lawful and constructive manner. Any delay in the approval for this application stems from the applicant's failure to conform to limitations in Section 6409(a) and/or work with city staff to develop a feasible alternative. Boulder's experience also demonstrates the need for localities to review these applications in the first instance to determine whether they qualify as an eligible facilities request, and that failure to qualify for mandatory approval under Section 6409(a) does not spell certain death for a proposed collocation or modification. In contrast, selectively representing the facts to a federal agency to support further preemption of local authority does not further deployment, it compromises productive working relationships.

4. Photo Simulations for Non-camouflaged Facilities

Photo simulations expedite post-construction inspections for all new and modified wireless deployments. Inspections based on construction plans alone can be time-consuming as the plans may not show all equipment that belongs to other collocated carriers. Photo simulations with before-and-after illustrations capture the entire scope and allow inspectors to more efficiently confirm that what the permittee installed matches what the permit authorized. Accordingly, most local governments

[97] *Id.* This submission was received after the affidavit from Mr. Stafford was signed on October 28, 2019, and therefore this information is not included in the signed statement.

require photo simulations and many require them to be incorporated into the final construction plans.

The need for an efficient review process applies with equal force to modifications on concealed and unconcealed facilities. Permittees also share in the benefits because quicker inspections reduce costs that would be passed through to the permittee. Accordingly, the Commission should not preempt photo simulation requirements merely because the modification would occur on a non-camouflaged site.

5. Content-Based Restrictions on Comments at a Public Hearing

As discussed in Western Communities Coalition's comments, the Commission cannot—and should not—attempt to preclude a state's or local government's choice to conduct its business through public meetings.[98] If a local government chooses to conduct a public hearing, several industry commenters suggest that the Commission should restrict comments on topics unrelated to the criteria for an eligible facilities request.[99] The Commission should reject this constitutionally objectionable proposal.

When a state or local government conducts a public meeting to conduct its business and receive comments from the public, it establishes a limited public forum in which it generally may not discriminate against speech based on its content.[100]

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[98] *See* Western Communities Coalition Comments at 23-30.
[99] *See, e.g.*, T-Mobile Comments at 17.
[100] *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) ("[A] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"); *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 167 (1976).

Any content-based restrictions must be narrowly drawn to effectuate a compelling state interest.[101]

Here, the Commission lacks a compelling state interest. Public comments on factors that may not affect whether a modification meets the criteria for an eligible facilities request could, at most, prolong the meeting by a few minutes per speaker. An interest in efficient meetings, while an innocent motive, cannot justify a content-based restriction on protected speech that does not unreasonably disrupt the meeting.[102]

Moreover, this rule would be virtually impossible to enforce. The line between relevance to the criteria for approval and relevance to the public's interest in the project defies a bright-line distinction. Remedies would be equally dubious. Would the Commission deem an application granted merely because someone at a public meeting said something "irrelevant" to the criteria for an eligible facilities request?

IV. SUBSTANTIAL CHANGE ISSUES

The Petitions and their industry supporters urge the Commission to substantially change the existing criteria for a substantial change. If adopted, these proposals would abrogate (and, in some instances, eliminate) existing commonsense

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[101] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

[102] *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2229 (2015) ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."). Although the proposal appears to be motivated by a desire to shield industry members from increasingly frequent criticism directed at them or growing concern over adverse environmental and health effects from RF emissions, the content-based restriction renders the motivation for the restriction irrelevant. *Id.* "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill v. Colorado*, 530 U.S. 703, 744 (2000) (SCALIA, J., dissenting).

limitations adopted by the Commission in its 2014 Infrastructure Order. Many proposals advanced by the industry have been previously rejected, and the Commission should do so again.

A. Concealment Issues

Protections for concealment elements in the Commission's existing rules are among the most important for local communities concerned about the potential for blight caused by out-of-character infrastructure. The proposed changes in the rules seek to exclude existing concealment elements from these protections and/or license the applicant to ignore concealment elements it finds inconvenient. The Commission should retain its existing regulations and reject these proposals.

1. Concealment Elements Preserved Under Rule 1.6100(b)(7)(v) Are Not Cabined to "Stealth" Facilities

i. "Concealment" Does Not Require an Elaborate Scheme to Hide Equipment from Public View.

Concealment elements are often small adjustments—as small as a well-selected paint or strategically placed equipment cabinet—that mitigate unnecessary aesthetic impacts from unsightly facilities. As the Commission previously recognized "a replacement of exactly the same dimensions could still violate concealment elements if it does not have the same camouflaging paint as the replaced facility."[103] This would be as true for a monopole as it would be for a monopine.

[103] *2014 Infrastructure Order* at ¶ 200 n.543.

To be sure, some towers and base stations can be so architecturally integrated into the natural and built environment that the average person would not even notice the concealment itself. For example:

Figure 1: AT&T stealth clock tower, Rio Rancho, NM.

Figure 2: Verizon Wireless mono-eucalyptus among natural trees, Oceanside, CA.

Figure 3: Verizon Wireless farm silo tower, Arvada, CO.

Figure 4: Multi-tenant base station (antennas behind RF-transparent screens within the architectural tower), Temecula, CA.

These examples also include facilities designed not as some ordinary feature ordinarily associated with the location or support structure but as public art. For example:

Figure 5: Multi-carrier site by Crown Castle, San Diego, CA.

Figure 6: Multi-carrier site in Albuquerque, NM.

Although complete stealth may be a worthwhile objective, it may not be a practicable standard in all situations. Conditions needed to blend the facility may not exist or space required to construct the project may not be available.

In these situations, local governments may still request that applicants conceal certain equipment elements through targeted techniques. Just because the local government does not feel compelled to require all wireless towers to masquerade as trees or clock towers does not make their efforts to mitigate blight from unsightly towers any less a concealment element.

Many jurisdictions require tower-mounted equipment and hardware to be colored to match the support structure:

Figure 7: AT&T small cell on existing streetlight in San Diego, CA.

Figure 8: Same AT&T small cell colored to match the underlying pole.

Figure 9: Macrocell antennas spread over light standards at the Opera House parking lot in Santa Fe, NM.

This concealment element also works well in deployments without any radome or other shroud over the pole-mounted equipment:

Figure 10: Small cell painted to match green light standards in Scottsdale, AZ.

Figure 11: Small cell painted to match tan streetlight in Fountain Hills, CA.

Without the matched color, the concealment effect diminishes as the equipment stands out in higher visual contrast:

Figure 12: Verizon Small Cell in Orange County, CA.

Many cities require applicants to route their cables from the ground equipment to the antennas through risers within the monopole.[104] This approach applies equally to facilities within and outside the public rights-of-way:

[104] *See* Western Communities Coalition Comments at 63 (discussing allegations that the City of Beaverton, Oregon, requires all cables to be routed through internal risers).

Figure 13: Mobilitie small cell on streetlight in Los Angeles, CA, with exposed wires.

Figure 14: Mobilitie small cell on streetlight in San Diego, CA, without exposed wires.

Figure 15: American Tower monopole in Taos, NM, with external cable risers.

Figure 16: Monopole in Escondido, CA, with internal cable risers that exit through pole access ports adjacent to each array.

Others require remote radio units, amplifiers and other accessory equipment to be placed behind the antennas, or concealed within the support structure.

Figure 17: Two facilities concealed as field-lights in Indian Wells, CA. On the right, modifications over time have caused the concealment panels to be removed, while the concealment on the left has been preserved.

Existing or new landscape features play an increasingly important role in concealment for ground-mounted equipment cabinets, especially in the public rights-of-way.

Figure 18: Ground-mounted cabinets behind landscape features in Calabasas, CA.

Similarly, hardscape and other non-landscape features in the public rights-of-way can be used as a concealment element on non-"stealth" facilities:

Figure 19: Decorative iron screens used to partially screen ground-mounted equipment associated with a cell site in Scottsdale, AZ.

Figure 20: Wireless site doubling as a trail bench shelter on open space property in Arvada, CO.

Industry comments also generally fail to recognize that some concealment techniques aim to blend the equipment into the existing utility ecosystem.[105] Particularly for facilities in or adjacent to utility easements and the public rights-of-way, deliberate efforts to site transmission equipment on poles and in cabinets like those used for electric utilities, wireline communications and traffic control may be less aesthetically disruptive than a faux tree. For example:

Figure 21: Proposed small cell by Verizon in Palo Alto, CA. The equipment has been elongated to more closely match the pole width and painted flat brown to blend with the underlying wood utility pole.

[105] *See, e.g.*, American Tower Comments at 9.

Figure 22: DAS node in Rancho Palos Verdes, CA, designed as a replacement for a stop sign on a wood pole. Although the replacement pole requires significantly more height than a normal stop sign, this approach considers that there are no existing above-ground utilities within the area. The concealment balances the technical necessities against the city's desire to avoid unnecessary obstructions in the public rights-of-way.

There are only so many ways to conceal an antenna or equipment cabinet on a pole in a wide-open streetscape. This approach necessarily requires the local government to consider factors such as overall height and equipment volume—the same factors WIA and its allies urge the Commission to prohibit. When an applicant proposes to enlarge, expand or otherwise alter the equipment or support structure in a manner that would cause it to stand out from the other poles, boxes and cables around it, the effect on the concealment elements is no different than if the applicant proposed to extend a faux tree in a manner that would make it stand out from nearby

natural trees.[106] Indeed, the federal court in *Douglas County* reached a similar conclusion when Crown Castle proposed to expand an existing tower designed "to resemble an old fashioned, yet unadorned utility pole" near a state highway.[107]

Whether an elaborate plan to completely conceal the fact that a facility exists or several smaller efforts to improve a visible facility's overall all appearance, any deliberate effort to mitigate unnecessary ugliness qualifies as concealment. To the extent the Commission adopts industry commenters' view, local governments would be incentivized to require *all* new facilities to be completely stealth, which would increase costs and review periods for new deployments. The incentive would be especially strong for facilities in the public rights-of-way due to the large size and number of facilities the Commission and industry anticipates for 5G deployments.[108] For this and other reasons described above, arguments by the industry that only stealth facilities or those intentionally designed to look like something other than a wireless facility should be rejected.

ii. AT&T's Interpretation that Concealment Exceptions Protect Only "Stealth" Facilities Conflicts with Rule 1.6100(b), the *2014 Infrastructure Order* and English Grammar

AT&T suggests that the Commission's own interpretation already "applies only to 'stealth wireless facilities," and only to the stealth 'elements' of such

[106] Brief for Respondent, *Montgomery Cty. v. FCC*, Nos. 15- 1240 and 15-1284, Dkt. No. 60 at 41 (4th Cir. 2015).
[107] *Board of County Commissioners for Douglas County v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, 2019 WL 4257109 at *1 (D. Colo. Sep. 9, 2019).
[108] *See* 47 C.F.R. § 1.6002(l) (defining a small cell to include structures that are 50 feet tall with equipment 28 cubic feet in volume); *Small Cell Order* at ¶ 47 (anticipating hundreds of thousands new facilities).

facilities."[109] The Commission should reject this interpretation as it conflicts with Rule 1.6100(b)'s text and structure and can only be understood by an unnatural and grammatically incorrect construction for a single sentence in the *2014 Infrastructure Order*.

First, Rule 1.6100(b)(7)(v) applies to any modification that would defeat any concealment element on any "eligible support structure."[110] The Commission defines an "eligible support structure" as "[a]ny tower or base station . . ., provided that it is existing at the time the relevant application is filed . . . ."[111] Whereas other criteria for a substantial change specifically distinguish between structure types (towers or base stations) and location (facilities in the public rights-of-way or not), the limitation on modifications that defeat existing concealment elements does not discriminate.[112] Accordingly, Rule 1.6100(b)(7)(v) cannot be read as limited to only "stealth" facilities or stealth "elements" because it preserves concealment elements on any existing tower or base station and nothing in the Commission's rules suggests otherwise.

Second, AT&T's interpretation relies on an untenable construction given to a single sentence in the *2014 Infrastructure Order*:

> We agree with commenters that in the context of a modification request related to concealed or "stealth"-

[109] AT&T Comments at 7.
[110] 47 C.F.R. § 1.6100(b)(7)(v) ("A modification substantially changes the physical dimensions of an eligible support structure if it . . . would defeat the concealment elements of the eligible support structure); *see also 2014 Infrastructure Order* ("a modification constitutes a substantial change in physical dimensions under Section 6409(a) if the change . . . would defeat the existing concealment elements of the tower or base station . . . .").
[111] 47 C.F.R. § 1.6100(b)(4).
[112] *Compare id.* §§ 1.6100(b)(7)(i)–(iii) (establishing different thresholds for changes in height, width and equipment cabinets for towers on private property versus base stations and towers in the public rights-of-way), *with id.* § 1.6100(b)(7)(v) (applying the same standard for concealment preservation to any existing tower or base station without distinction based on location or other factors).

> designed facilities—*i.e.*, facilities designed to look like some feature other than a wireless tower or base station—any change that defeats the concealment elements of such facilities would be considered a "substantial change" under Section 6409(a).[113]

The sentence plainly refers to "concealed *or* stealth-designed facilities".[114] Despite AT&T's emphasis elsewhere in its quotation to distract from the disjunctive list,[115] the Commission referred to more than "stealth" facilities when it described when Rule 1.6100(b)(7)(v) applies.

To achieve its desired meaning, AT&T implies that the clause "*i.e.*, facilities designed to look like some feature other than a wireless tower or base station" modifies both the phrases "concealed" and "'stealth'-designed".[116] In other words, this portion operates as a nonrestrictive clause that modifies all the subjects in the list it follows. Yet AT&T's approach ignores basic grammar and punctuation conventions. Punctuation matters because the Commission, like Congress, is presumed to follow accepted punctuation standards.[117]

The more natural and grammatically correct interpretation is that this is a restrictive clause that modifies only "'stealth'-designed" facilities. Although punctuation around a clause usually signals a nonrestrictive clause, the word "that" cannot be used in a nonrestrictive clause.[118] The abbreviation "*i.e.*" means "that is"[119]

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[113] *2014 Infrastructure Order* at ¶ 200.
[114] *Id.* (emphasis added).
[115] *See* AT&T Comments at 7 (placing emphasis on the words around the "or" but not on the "or" itself).
[116] *Id.*
[117] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 528–29 (1987).
[118] Tex. Law Review Manual on Usage & Style, 12th Ed., § 1.21, Appendix at 77.
[119] *i.e.*, Merriam-Webster (last visited Nov. 1, 2019), https://www.merriam-webster.com/dictionary/i.e.

and thus cannot be read as nonrestrictive. Under the rule of the last antecedent, a restrictive clause modifies only the noun that most closely precedes it in the sentence.[120] The noun that immediately follows the clause is "'stealth'-designed facilities".[121] Therefore, "facilities designed to look like some feature other than a wireless tower or base station" refers only to "'stealth'-designed facilities" and not to "concealed" facilities.

Finally, the Commission's quotation marks around the word "stealth" indicate that it intended to provide the term with a specialized definition.[122] Thus, a specialized definition such as the one in the restrictive clause most naturally relates to the term highlighted as unusual by the quotation marks.

Accordingly, the Commission should reject AT&T's interpretation as inconsistent with Rule 1.6100(b), the *2014 Infrastructure Order* and proper grammar rules.

2. "Existing Concealment Elements" Refer to Those Installed at the Time the Applicant Submits an Eligible Facilities Request

The Commission should reject proposals to restrict "concealment" to only those installed with the initial deployment.[123] Such a construction contravenes the plain

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[120] *See, e.g.*, *Lockhart v. United States*, 136 S.Ct. 958, 962 (2016) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 528–29 (1987) (finding that a restrictive clause following the last item in a list modifies only the last item in the list).

[121] *2014 Infrastructure Order* at ¶ 200.

[122] *See Quotation Marks*, GRAMMAR BOOK, https://www.grammarbook.com/punctuation/quotes.asp (last visited Nov. 1, 2019) ("Quotation marks are often used with technical terms, terms used in an unusual way, or other expressions that vary from standard usage.").

[123] *See, e.g.*, American Tower Comments at 10 ("[T]he Commission should confirm that concealment elements are limited to those imposed during the initial siting process, which would preclude new concealment requirements from being introduced and applied to existing structures to prevent Section 6409 relief.").

language in Section 6409(a) and the *2014 Infrastructure Order* and harms the public interest.

Section 6409(a) contemplates less-than-substantial changes to an "existing wireless tower or base station"—not the tower or base station that existed at one time in the past.[124] Consistent with the statute's present-tense usage, throughout the *2014 Infrastructure Order*, the Commission refers to the "*existing* concealment elements" as those which a proposed modification may not defeat.[125] Although some substantial-change thresholds expressly contemplate that the baseline measurement should be defined by circumstances as they existed in the past, the concealment threshold is not among them.[126] Nothing in the *2014 Infrastructure Order* suggests that "existing concealment" means the concealment that existed immediately after the initial deployment.

Moreover, the proposal to freeze concealment techniques for existing facilities nationwide at the standard that existed in the past—in some cases decades ago—is bad policy. Such a rule would both reverse substantial investments by communities into site rehabilitation and stagnate investments in innovative concealment techniques.

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[124] *See* 47 U.S.C. § 1455(a).

[125] *See 2014 Infrastructure Order* at ¶ 21 (emphasis added); *id.* at ¶ 188 ("it would defeat the *existing* concealment elements of the tower or base station") (emphasis added); *id.* at ¶ 200 ("would defeat the *existing* concealment elements of the tower or base station") (emphasis added).

[126] *See, e.g.*, 47 C.F.R. § 1.6100(b)(7)(i)(A) (defining the baseline for cumulative height increases as the original structure height for base stations and the height that existed the date Congress adopted the Spectrum Act for wireless towers on private property); *2014 Infrastructure Order* at ¶ 197 (declining "to provide that changes in height should always be measured from the original tower or base station dimensions").

First, as Section 6409(a) and the industry commenters acknowledge, wireless infrastructure evolves over time. Concealment for these facilities evolves, too. At appropriate times throughout a facility's lifespan, the local government may require updates to the concealment elements that reflect advances in technology and/or changes in the surrounding area. The proposed interpretation would authorize applicants to disregard those periodic improvements.[127]

An appropriate time to consider updates occurs when the permit for the underlying facility expires as happened in Cerritos, California, when T-Mobile sought to renew an expired permit (originally approved in 2001) for an existing monopine facility at 17326 Edwards Road. Under the city's code in effect at that time, permits for wireless facilities may be renewed in 10-year intervals provided that the permittee requests renewal prior to the expiration and the city makes certain findings.[128] The city also evaluates whether any advancements in concealment techniques should be incorporated into the new permit.[129]

On April 7, 2017, T-Mobile tendered its application as a request to renew an existing permit—not as an eligible facilities request.[130] On May 5, 2017, city staff issued a detailed denial letter that explained the basis for the determination that the

[127] The proposed interpretation would also lead to absurd results in situations where a facility comes into existence concealed as one thing but evolves over time to be concealed as another. *See, e.g.*, Western Communities Coalition Comments at 25-26 (describing a Sprint flagpole that morphed into a smokestack as the carrier needed more room to conceal the equipment than the flagpole could accommodate).
[128] *See* CERRITOS, CAL., CODE § 22.42.370.
[129] *See id*.
[130] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Sonal Thakur, Core Development Services as agent for T-Mobile (Apr. 7, 2017).

proposed modification would defeat the existing monopine concealment.[131] City staff also encouraged T-Mobile to work directly with staff and its consultants to find a design that complied with the city's concealment regulations.[132]

This denial did not occur in a vacuum. Less than 10 months earlier, T-Mobile installed a similar monopine in a similar location (16307 Arthur Street; T-Mobile Site ID: LA33776B) but with significantly less visual impact on the community:

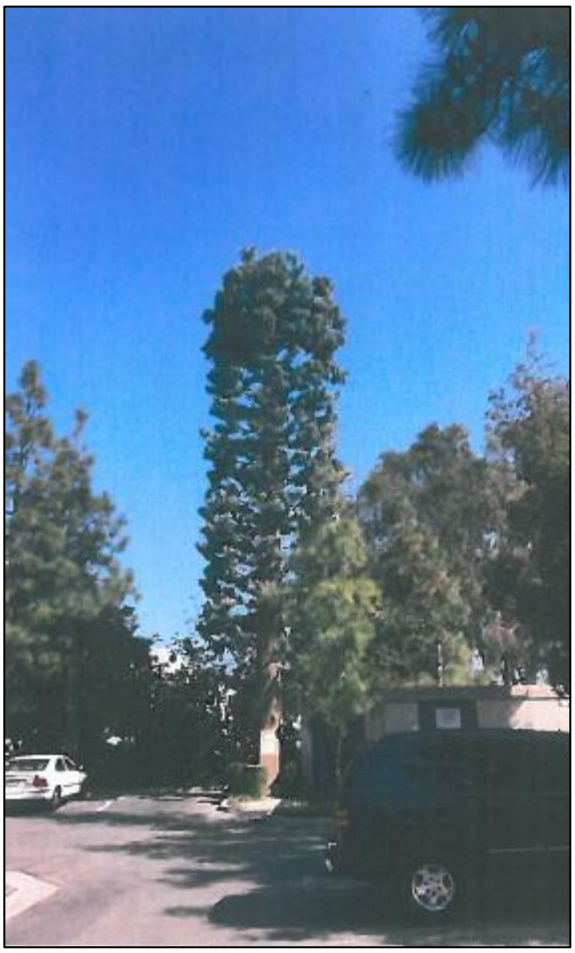

Figure 23: Edwards Road Monopine

Figure 24: Arthur Street Monopine

[131] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Sonal Thakur, Core Development Services as agent for T-Mobile (May 5, 2017).
[132] *See id*.

Both facilities had similar concealment elements: painted structural support members, faux-pine branches, faux pine covers over tower-mounted equipment and enclosures around the base and other ground-mounted equipment. But one involved techniques and materials from the early 2000's and the other was state-of-the-art for 2017, including fuller and more lifelike faux pine needles, faux bark cladding rather than brown paint on the exposed pole and a more thoughtful taper with a topper that brought the monopine to a natural point.

City staff made it clear that upgrades to the expired tower to match the more recently approved tower would be approved.[133] Ultimately, the city approved the Edwards Road monopine under a plan to re-branch the existing pole with fuller and more lifelike faux pine branches and fit the equipment with similarly improved faux-pine covers.

This real-world example typifies how local governments periodically revisit concealment: the city required modernized, not different or additional, concealment techniques based on more recent deployments in comparable circumstances. The process is a collaborative one that aims to benefit the community in a manner that does not frustrate eligible facilities requests.

Second, the rule would create disincentives for carriers and infrastructure providers to invest in new concealment techniques, which, in turn, would harm communities impacted by unsightly facilities. The harm would extend to other industry members who innovate, fabricate and install new concealment techniques—

[133] *See id.*

suppressing demand for these goods and services would reduce production and likely result in lost employment.

3. WIA's Proposal to Require Local Governments to Specifically Describe Each Concealment Element Places an Inefficient Burden on the Review Process Unlikely to Mitigate Controversies

WIA and its supporters allege that the Commission must "clarify that concealment elements are only those expressly designated and permitted as such" or else site operators will suffer from confusion and "gamesmanship" at the local-government level.[134] The Commission should reject this request because, aside from the harmful and unfair retroactive impacts this rule would impose,[135] it would simply waste time and resources.

A picture is worth a thousand words. For this reason, many local governments approve concealment elements by reference to project plans, photo simulations or both. These documents provide clear information about dimensions, size, scale, color, texture, quality and other concealment elements that would be difficult and potentially more contentious if described in minute detail as proposed by WIA.

Diagrams and photo simulations also save time. Although it may be theoretically possible to describe all the concealment elements for each site, the project plans and/or photo simulations provide a much more complete and accessible description for all stakeholders to follow. Local officials would likely still require photo simulations to properly grasp the proposed project—especially for new facilities

[134] *See* WIA Dec. R. Petition at 12.
[135] Western Communities Coalition Comments at 37-39; NATOA *et al.* Comments at 9-10, NLC *et al.* Comments at 18-19.

subject to review by a board, commission or council in a public meeting setting. Thus, the proposed requirement would simply waste everyone's time while local officials translated perfectly useful plans and photo simulations into a detailed concealment-element list.

In any event, the proposed requirement for hyper-technical written findings does not appear likely to avoid controversies over concealment elements. Whether the local government puts the requirement in writing or incorporates photo simulations by reference, some applicants will go to great lengths to ignore local concealment requirements.

In the many jurisdictions who incorporate approved plans and photo simulations into permits, the problems primarily occur when applicants fail to build the facilities as represented in their applications. For example, when Crown Castle applied for a new discretionary permit to maintain operations for a project site in the city (where the original discretionary permit had already lapsed), Crown Castle proposed to re-branch a first-generation, dilapidated existing monopine. Photo simulations were submitted to show local officials how the proposed tower would look after final installation:

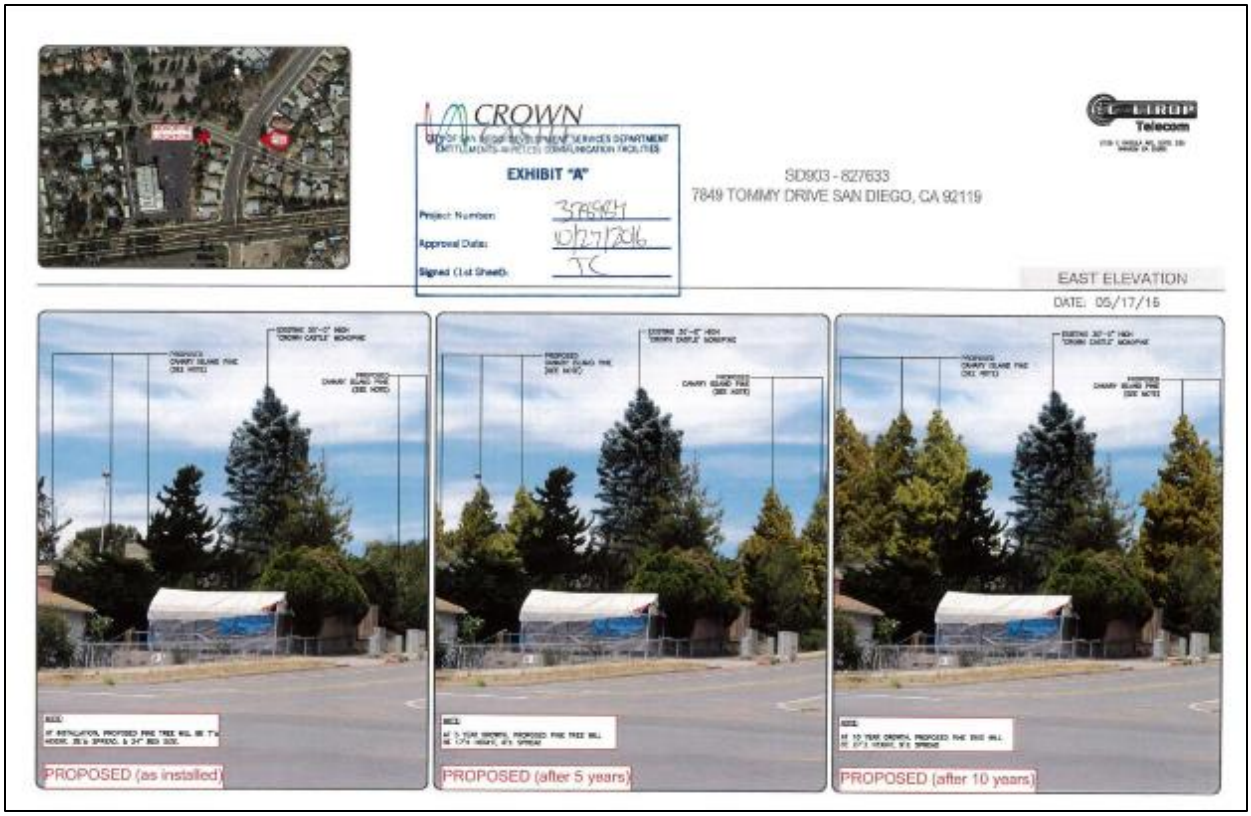

Figure 25: Crown Castle photo simulations submitted with a permit application to the City of San Diego, CA.

In reliance on the representations in the photo simulations, the city approved the proposed project over objections by neighbors in October, 2016. Shortly thereafter, in December 2016, Crown Castle submitted a Section 6409(a) application to modify the site. This application was denied because the site was not an existing facility. The development permits approved in October had not been "utilized" by the applicant (meaning the permit was not signed, notarized and recorded; no subsequent building permit had been issued; and the site had not been constructed in accordance with the approved development permit). Further, the original development permit had expired in 2014. Crown Castle was advised of these deficiencies in January 2017. Crown Castle then moved forward without obtaining a building permit, and re-branched the tree. In July of 2017, Crown Castle requested Planning Approval on this unpermitted

re-branching and were reminded that they needed a building permit per the original approval. Crown Castle did not apply for this permit until June 2018, and the submitted materials showed that the "finished" facility appeared significantly different from the quality shown in the approved discretionary application.[136]

[136]Despite the industry's portrayal of local governments as the delay in deployment, it should be noted that this tree still looks like this today. Staff exercised discretion to work with Crown Castle to cure the deficiencies rather than commence a code violation proceeding, but Crown Castle's inability to construct their facility according to the photo simulations that they prepared and submitted is now requiring an application for an Extension of Time to utilize the 2016 Development Permit.

Figure 26: Post-installation inspection photo by San Diego Development Services staff.

The re-branched monopine looks nothing like the photo simulations offered with the application—or a pine tree for that matter.

When approached by city staff about the deficiencies in design construction, Crown Castle sought to replace the approved photo simulations (that Crown Castle

originally created and asked the city to rely on) with a different rehabilitation plan based on the following reasoning:

> Before Crown does any additional work at this site, we need to secure the city's agreement as to what is reasonably needed—we believe the attached exhibit should represent an acceptable level of additional work. Once we receive the city's approval, Crown will authorize the additional rebranching work to be completed. No carrier or infrastructure provider can be expected to produce a perfect tree—this is completely unreasonable, unnecessary and unnatural. Crown believes the tree as currently rebranched, looks natural and screens the antennas. Nevertheless, we are willing to complete the additional work recommended by SCI.[137]

To which the city responded:

> We're not looking for a perfect tree, we're just looking for an accurate representation of the approved sims that complies with all other permit conditions. We haven't seen that yet. I've attached your approved Exhibit A. When compared to the exhibit you sent, we can see that the sims do not match – and without seeing the marked up changes as part of a new simulation, I'm not confident that your proposed fix will remedy the situation. At the discretionary stage, Crown Castle showed us sims that were approved by the Planning Commission. By submitting those sims, Crown Castle represented that they could produce that quality of work. If the finished project matches the sims Crown submitted and meets the conditions of the permit that Crown signed, you're fine. This isn't currently the case.[138]

The actions and explanations of Crown Castle detailed above, may cause some to question whether Crown Castle ever intended to install the concealment as they

[137] Email from Jon Dohm, Crown Castle, to Travis Cleveland, San Diego Development Servs. (Sep. 18, 2017 11:59 AM).
[138] Email from Travis Cleveland, San Diego Development Servs., to Jon Dohm, Crown Castle (Sep. 18, 2017 2:14 PM).

proposed and as the city approved. All the time, effort and resources to convert a perfectly good photo simulation provided by the applicant into an exhaustive concealment-element list matters not when some applicants will waste just as much time and effort to avoid their concealment obligations altogether.[139]

A similar scenario occurred between T-Mobile and the City of San Diego over a monopine at a different location. In 2016, Crown Castle received approval for a monopine (that included both AT&T and T-Mobile facilities). The facility, as approved by the city, appears in Figure 27, below:

[139] Additionally, if Crown Castle had simply constructed the facility as they indicated they would do in their proposal, city staff would have had additional time to dedicate to reviewing other projects and moving them along. Requiring detailed written explanations of concealment elements would not have assisted either party with resolving this issue.

Figure 27: Crown Castle (AT&T / T-Mobile collocation) monopine as originally constructed in 2016.

In 2019, T-Mobile requested a modification to the monopine under Section 6409(a) and submitted plans that included a 3-D simulation to illustrate the finished concealment plan:

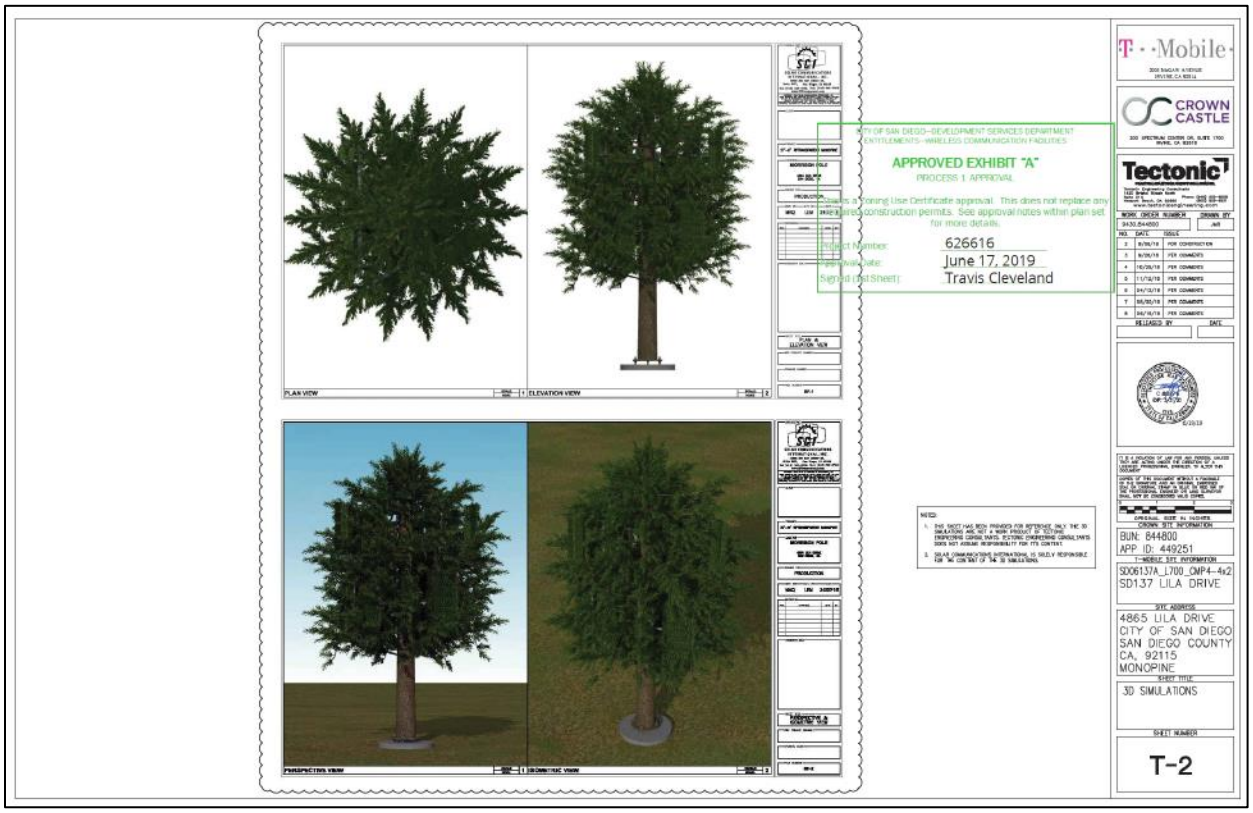

Figure 28: 3-D simulation for Crown Castle (Site ID 844800) approved by San Diego Development Services.

However, despite the clear representation and detailed information in the approved site plans, T-Mobile's contractor called for an inspection on what appeared to be only a partially constructed tree where the modification as constructed clearly defeated the concealment elements:

Figure 29: Final inspection photo (not approved) by San Diego Development Services staff of Crown Castle (Site ID 844800).

WIA cites Crown Castle as support for its allegation that San Diego "take[s] the position that additions or modifications of antennas on faux trees defeat concealment even if the appearance of the faux tree remains the same,"[140] This statement is false. Not only did San Diego approve this application to modify a faux tree, it has approved approximately 30 other such applications. However, this modification shows how an alleged eligible facilities request drastically alter the sites'

[140] WIA Decl. R. Petition at 10 (citing Letter from Kenneth J. Simon, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 12-13 (Aug. 10, 2018)).

appearance and fail to be consistent with representations in an applicant's own applications to the city.

4. The Commission Should Reject AT&T's Proposal to Excuse Applicants from Concealment Requirements Due to Space Limitations on the Support Structure

Any suggestion that modifications should be exempt from such requirements to the extent that the existing support structure cannot, for example, accommodate additional internal cables or additional RRUs behind the antennas should be rejected.[141] The *2014 Infrastructure Order* recognized the need for at least some cumulative limit on expansions, either expressly through a cumulative height limit or impliedly through an interpretation that replacement structures needed to support the additional equipment were *per se* not covered by Section 6409(a). The same principle applies to concealment: if the applicant proposes a change so large it cannot be concealed in the same manner as the existing wireless tower or base station, the change must be considered substantial.

This is not to say that any such modification would be ultimately prevented. As noted by several commenters, local governments work collaboratively with applicants to find workable solutions to proposed deployments even when Section 6409(a) does not *mandate* approval.

To illustrate this point, consider again the Edwards Road monopine in Cerritos, California.[142] A few months after the city initially declined to renew the monopine in its then-current state, Crown Castle (as agent for T-Mobile) submitted

[141] *See, e.g.*, AT&T Comments at 7.
[142] *See supra* at 59-61.

an eligible facilities request for a modification to the same monopine.[143] After a brief tolling period due to application incompleteness, the city *approved* the modifications on the existing monopine subject to the same concealment conditions originally imposed on the site in 2001.[144] However, Crown Castle complained that compliance with the original conditions would be impossible because the existing monopine could not physically support the additional equipment and the related concealment elements.

Although Crown Castle could have simply replaced the pole under a discretionary review process, city staff offered to work collaboratively with the applicant to avoid burdens associated with full pole replacement but still preserve the original concealment through a re-branching plan. Indeed, the current balance between rights and limitations in Section 6409(a) contributed to the conditions for collaboration because both Crown Castle and the city had an incentive to work with the other.

B. Increases in Tower Height Without an Absolute Maximum Height Limit Undermines Careful Limits in Rule 1.6100(b)(7)(i)(A)

The Commission should reject proposals by WIA and other industry commenters to "clarify" that Rule 1.6100(b)(7)(i) allows for up to 20 feet between antenna arrays without regard to antenna size. This interpretation conflicts with the Commission's express intent to create an ascertainable maximum height limit for towers modified under Section 6409(a).

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[143] *See* Letter from Justin Davis, Crown Castle, to Cerritos Planning Department (July 22, 2015).
[144] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Justin Davis, Crown Castle (agent for T-Mobile) (Sep. 23, 2015).

Industry commenters point out that this interpretation would be consistent with the Collocation Agreement, which the Commission used as the basis for Rule 1.6100(b)(7)(i). However, these arguments gloss over important and intentional differences between the Collocation Agreement and Rule 1.6100(b)(7)(i).

Unlike the Collocation Agreement, Rule 1.6100(b)(7)(i) includes a cumulative limit on height increases and contains no exception for additional height needed to avoid interference. These distinctions "limit modifications that are subject to mandatory approval to the same modest increments over what the relevant governing authority has previously deemed compatible with local land use values."[145] The Commission emphasized its desire for a fixed maximum height increase when it rejected proposals by WIA and Verizon to measure the cumulative limit from "the last approved change" because it "would provide no cumulative limit at all."[146]

Here, a maximum height increase defined by separation between antennas, like one defined by the last approved change, "would provide no cumulative limit at all."[147] Antennas vary widely in length. Antennas on most wireless towers range from approximately two feet to eight feet in length and tend to get longer with each additional frequency band they can support. Section 6409(a) also applies to other "wireless" facilities that involve much longer antennas. Amateur radio antennas can be several hundred feet long and almost the entire 200-foot broadcast tower itself is an antenna.

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[145] *2014 Infrastructure Order* at ¶ 197.
[146] *See id.*
[147] *See id.*

Moreover, the permissible height increase would be impacted as much by the existing antennas on the tower as it would be by the proposed antennas on the tower extension. WIA's proposal would be for 20 feet *between* the antenna arrays. The permissible height limit would therefore depend on the existing antenna length and position on the tower because the highest point on the existing antennas would set the base line for a 20-foot separation from the lowest point on the new array. As a result, the cumulative height limit would be different for two otherwise identical towers if the antennas on one tower were shorter or installed at a lower height.

Accordingly, under WIA's proposed clarification to Rule 1.6100(b)(7)(i), the maximum height increase for towers would be unascertainable, much larger than the Commission ever intended and primarily dependent on the existing antennas rather than the existing tower. The Commission should reject this unnecessarily complex clarification as inconsistent with its intent to create a simple formula for a maximum limit on height increase to existing towers.

C. Increases in Base Station Height Without Reference to the Area Approved for Transmission Equipment Would Produce Absurd Results

The proposal to define the substantial change in height by reference to any point on a non-tower structure would result in absurd outcomes.[148] Unlike wireless towers, which are almost uniformly narrow poles or lattice towers on a relatively small footprint, base stations vary widely in shape, size and architectural design and can cover very large areas.

[148] CTIA Petition at 15; AT&T Comments at 10–11.

Consider, for example, a low-slung factory with a smokestack on one end that supports unconcealed antennas. The main structure may be 45 feet tall (approximately three stories) and sprawl over 100,000 square feet (approximately one city block) but the smokestack may be 150 feet tall and less than 75 feet in diameter.

Figure 30: Multi-carrier base station, Philadelphia, PA.

Figure 31: Multi-carrier base station on power plant in Carlsbad, CA.

Under CTIA's proposal, its members could install an entirely separate extension, up to 10 feet or 10% taller than the existing smokestack (whichever is greater), anywhere on the rooftop merely because the existing smokestack is physically connected to the factory building.[149] Whether the existing facilities were installed on the lower rooftop or the smokestack would not matter, and, if the existing facilities were unconcealed, the new extension could be unconcealed as well. Thus, if

[149] CTIA Petition at 15–16; AT&T Comments at 11.

the Commission adopted CTIA's proposal, its members could erect a new, unconcealed, up-to-120-foot tower on the rooftop without any local input.

This is precisely the outcome the Commission sought to avoid when it modified the Collocation Agreement standard as applied to non-tower structures.[150] Rather than a 20-foot extension in all cases, the Commission adopted a lower threshold based on its assumptions about the parameters for multiple transmitters on a shared structure.[151] Likewise, the Commission set the baseline for cumulative extensions to base stations as its original height because subsequent by-right modifications "may not reflect a siting authority's judgment that the modified structure is consistent with local land use values."[152] Indeed, the Commission apparently did not expect applicants to routinely request height extensions on non-tower structures since the cumulative height limit for base stations presumes that additional antennas would be deployed horizontally.[153]

Moreover, the industry commenters offer no technical justification for this interpretation. The ten-foot "fixed minimum" extension for base stations under Rule 1.6100(b)(7)(i) purportedly serves to avoid either interference among vertically stacked antennas or RF shadowing created when antennas cannot "see" below the

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[150] *See 2014 Infrastructure Order* at ¶ 193.
[151] *See id.*; *see also* 47 C.F.R. § 1.6100(b)(7)(i). Although the current rule leaves open the potential for 20-foot extensions to base stations, this would occur only on non-tower structures over 200 feet tall (i.e., 10% over the original structure height).
[152] *See 2014 Infrastructure Order* at ¶ 197.
[153] *See* 47 C.F.R. § 1.6100(b)(7)(i)(A) ("Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops . . . ."); *2014 Infrastructure Order* at ¶¶ 188, 197 (referring, in each instance, to "buildings" as examples for when antennas would be horizontally separated).

roofline.[154] In the factory example above, the right to install a separate extension anywhere on the structure up to 10 feet or 10% taller than the smokestack would amount to serious overkill with little-to-no justification. Even in less dramatic examples, the Commission's existing rules already take into account conservative estimates for technical necessities.[155]

The best justification industry commenters can muster is that they perceive the text in Rule 1.6100(b) as flexible enough to permit their interpretation.[156] This is, of course, no justification at all, particularly under a standard that requires the agency to explain why the facts that supported its earlier policy are no longer persuasive.[157] The Commission should reject this proposed interpretation.

D. Equipment Cabinet Issues

Industry-proposed changes to the definition of equipment cabinets create new ambiguities and would be untethered from any reasonable conception of a substantial change. Moreover, some commenters appear to have conjured a "common industry understanding" specifically for this proceeding. The Commission should not find such arguments credible.

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[154] *See 2014 Infrastructure Order* at ¶ 193 ("Without such a minimum, we find that the test . . . may undermine the facilitation of collocation, as vertically collocated antennas often need 10 feet of separation and rooftop collocations may need such height as well.").

[155] The ten-foot vertical separation is an ultraconservative precaution against interference. Most facilities can operate normally within five feet from other transmitters, many can operate normally with less than a five-foot separation and some can accommodate "tip-to-tip" configurations with no separation at all. The ten-foot extension also allows for an eight-foot antenna to be placed up to six feet behind the roofline without a significant shadow (under the rule-of-thumb that one foot in additional elevation is needed for every three feet in setback from the roofline).

[156] *See* CTIA Petition at 16.

[157] *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

1. There Appears to Be No "Common Industry Understandings" that Equipment Cabinets Must be Mounted on the Ground

AT&T's proposal to define an "equipment cabinet" by "common industry understandings" threatens to undermine the limitation altogether.[158] At least one court rejected a similar argument by AT&T's contractor when offered as a justification for the right to expand the equipment footprint beyond the leased premises in a dispute with property owner.[159] Like the property owner in that case, state and local governments are not industry members and would lack any basis to understand or dispute whatever the site operator held out as a common industry definition for an equipment cabinet.[160]

In any event, the industry does not appear to share a common understanding about what qualifies as an equipment cabinet. Industry commenters in this proceeding coalesce around the notion that anything attached to a pole could not be an equipment cabinet.[161] By contrast, many equipment manufacturers apparently disagree and offer various prefabricated cabinets intended to be mounted on or affixed to a pole.[162] The manufacturers often point to a cabinet's adaptability to both pole-mounted and ground-mounted deployments as a selling point.

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[158] AT&T Comments at 9.
[159] *See Md7, LLC v. Seidner*, Nos. G042498 and G042755, 2011 WL 141123, *5 (Cal. Ct. App. Jan. 18, 2011) (upholding superior court determination that "industry standards" as to what certain terms in the lease could not bind a commercial landlord who was not an industry member).
[160] *See id*.
[161] *See* WIA Comments at 11; CTIA Comments at 2; Crown Castle Comments at 11; AT&T Comments at 9; T-Mobile Comments at 4; ACT Comments at 6.
[162] *See, e.g.*, *Small Cell Glossary*, RAYCAP, https://www.stealthconcealment.com/wp-content/uploads/2019/04/Small-Cell-Glossary-5.pdf (last visited Nov. 4, 2019) (defining a "[s]hroud/cage" as a "side-mounted enclosures that can be mounted on a pole to hold all radios and other necessary equipment"); *CUBE Low-Profile Small Cell Power Cabinets*, CHARLES INDUS. (2016), http://www.charlesindustries.com/CUBE_ordering_guides/CUBE%20Low%20Profile%20SC_2016.pdf (describing an equipment cabinet that "is attractive to real estate teams and municipalities because

Disagreement among industry members over "common industry understandings" makes the proposed interpretation unworkable and likely to engender further confusion. The Commission should reject this proposal.

2. Defining Large, Permanent Equipment Shelters as "Equipment Cabinets" is Absurd

WIA and AT&T expand the Petition's proposed definition of equipment cabinets to apply to brand new equipment shelters. Perhaps in recognition that an entirely new structure is more substantial than a replacement structure, WIA and an industry commenter relegated this proposal to a single footnote.[163] The Commission should reject this proposal.

Equipment shelters are large, permanent structures. Prefabricated concrete structures typically range from 120 to 456 square feet.[164] Some prefabricated shelters

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it 'hugs' the pole"); *FlexSure FLX12-2420*, PURCELL (2014), https://www.purcellsystems.com/core/files/purcellsystems/uploads/files/flexsure-ws/flexsure-flx12-2420-outdoor-gr487-enclosure-specification.pdf (describing pole-mounted options for small-cell equipment cabinet); *Product Search*, WESTCELL, https://www.westell.com/products/search?category%5B%5D=44463&category%5B%5D=2267&subcategory%5B%5D=6759&subcategory%5B%5D=6761&page=2 (last visited Nov. 12, 2019) (offering up to 16 different pole-mounted outdoor equipment cabinets); *Custom Small-Cell Cabinets*, SUN WEST ENGINEERING (Jan. 2015), http://www.sunwesteng.com/documents/products/small-cell-cabinet-flyer.pdf (describing cabinets customizable for "Pole or Pad Mounting as Required"); *Small Cell Concealment Solutions*, RAYCAP, https://www.stealthconcealment.com/wp-content/uploads/2019/07/Small-Cell-Pole-Solution-Overview.pdf (last visited Nov. 4, 2019) (describing boxes attached to "upper-middle of pole" as "enclosures").

[163] WIA Petition at 9 n.32; *see also* AT&T Comments at 31 n.107.

[164] *See Steel Reinforced Pre-Cast Concrete Buildings from Thermo-Bond Buildings*, THERMOBOND BUILDINGS, http://thermobond.com/precast-concrete-shelters/ (last visited Nov. 12, 2019) ("Concrete equipment shelters can range from 6' x 6' to 12' x 38' and can include a separate generator room."); *Equipment Shelters*, Wireless Estimator, http://wirelessestimator.com/content/industryinfo/174 (last visited Nov. 12, 2019); *see also Communications Shelters*, MODULAR CONNECTIONS, https://modularconnections.com/communication-shelters/ (last visited Nov. 12, 2019) ("The size of a building is *virtually unlimited*. Individual modules range from 8'W x 8'L to 13'8"W x 36'L, but multiple modules can be manufactured for larger square foot requirements.") (emphasis added).

can be as large as 4,000 square feet.[165] Enclosures at these dimensions often serve as data centers with interior offices and restrooms rather than cabinets for wireless service equipment.[166] The Commission cannot seriously consider such massive structures as an insubstantial change to the physical dimensions of the existing facility. Moreover, defining an equipment shelter as an equipment cabinet would produce the absurd result that multiple equipment shelters, not to exceed four, would be permitted without local input.

E. Proposed Site Expansions Are Not Minor, Especially If Permitted to Expand Unchecked

Industry commenters' justifications for site expansions run counter to their other positions. On one hand, industry commenters claim that existing safe harbors for local review hamper deployment and, on the other hand, that limitations on substantial change thresholds need to be relaxed because deployments have been so successful that there's no more room on existing towers and base stations.[167] Industry cannot always have its cake and eat it, too.

The Commission should reject WIA's request for a rulemaking. If the Commission does initiate a rulemaking proceeding, it should propose common-sense limitations on site expansions.

1. Industry Justifications for Site Expansions Fail to Rationalize the Enormous Expansion Space Requested

[165] *See 40' x up to 100' ESI-SPAN*, ESI-SET INDUS., https://precastbuildings.com/images/pages/floor-plans/floor-plans/40x100_easi_span.pdf (last visited Nov. 12, 2019).
[166] *See Shelter Solutions*, OLDCASTLE PRECAST (Nov. 2018), https://oldcastleinfrastructure.com/wp-content/uploads/2018/11/ShelterSolutionsFolder_rev2.pdf.
[167] *See, e.g.*, AT&T Comments at 29.

Industry commenters use many euphemisms to describe the significant deviation from the plain statutory text as currently implemented by the Commission.[168] Whatever the rhetorical minimization, all these commenters fail to acknowledge that some changes—however small—are *per se* substantial. In addition to deployment or excavation outside the site boundaries, the Commission identified at least four other circumstances in which any change would disqualify a modification under Section 6409(a).[169]

Even if the Commission could authorize site expansions, which it cannot, the record lacks a logical connection between the massive space requested by WIA and the reasons it claims to need so much. Industry commenters primarily claim to need the space to harden existing facilities with backup power sources and collocated additional service providers.

Backup power sources often do require some additional space beyond the equipment, but nowhere near the massive expansion requested by WIA and its members. Based on a survey among coalition members, when applicants request approval for a backup generator (either in connection with a new site build or a modification to an existing site), the average area required is approximately 85

[168] *See, e.g.*, AT&T Comments at 30-31 (using the terms "small", "slight", "limited" and "minor" approximately eight times to characterize large expansions); WISPA Comments at 8 (describing compound expansions as "minor"); Nokia Comments at 8 (describing compound expansions as "slight"); CTIA Comments at 15 (describing new ground equipment installation as "just outside" the compound's existing boundaries).

[169] *See* 47 C.F.R. §§ 1.6100(b)(iv)–(vi); *2014 Infrastructure Order* at ¶ 174 (modifications to sites deployed without proper review and approval); *id.* at ¶ 181 (modifications that involve support structure replacement); *id.* at ¶ 202 (modifications that violate "generally applicable laws related to public health and safety").

square feet.[170] In other words, the actual space needed for standby power is approximately 17.6 times smaller than a 30-foot extension to a typical 50' by 50' tower site compound. If the site operator could extend all four sides up to 30 feet, the expansion would be approximately 70.5 times larger than necessary to accommodate a typical generator.

Collocated communications cabinets often require even less space. For a macro site, a typical outdoor equipment cabinet occupies approximately 5.25 square feet and a comparable indoor equipment cabinet occupies slightly more than 3 square feet.[171] Assuming that an additional 50% larger space around the cabinet will be needed for cabinet door swings, footings and other peripheral hardware, the area increases to 7.9 square feet for outdoor cabinets and 4.5 square feet for comparable indoor models.[172] Under the same hypothetical 50' by 50' tower site compound, the expansion space would be anywhere from 190 to 780 times larger than necessary to add a single outdoor cabinet. If the collocation involved four outdoor cabinets and a diesel generator, the expansion space would still be between 12 and 47 times larger than the actual space required for the combined equipment.

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[170] The square footage was taken from construction plans submitted with permit applications and includes any equipment pads, catch basins, fuel storage and other space requested by the applicant and shown on the plans. This includes both diesel and natural gas generators. If natural gas generators are excluded from the dataset, the average increases to approximately 95 square feet.

[171] *See RBS 6000 Series Macro Base Stations*, Ericsson (Mar. 2018), https://www.motorolasolutions.com/content/dam/msi/docs/business/solutions/business_solutions/mission_critical_communications/lte_for_government_and_public_safety/_documents/_static_files/rbs_6000_series_product_spec_sheet_1104-1.pdf.

[172] No similar allowance was needed for the generator analysis above because the area requirements included space around the equipment as requested by the applicants. *See supra* note 170.

Even with a tower compound half as large as the example above, the space requested dwarfs the actual space required. The site operator with the right to expand 30 feet in any direction could accommodate between six and 23 additional collocations, each with four cabinets and a dedicated standby generator.

The expansion space requested bears no relationship to the actual space required for collocation because the 30-foot expansion standard in the NPA has nothing to do with collocations. The NPA concerns tower replacements. To maintain uninterrupted on-air status, the tower operator often builds the new tower on a separate foundation before it removes the old tower. Under these circumstances, a 30-foot latitude bears a reasonable relationship to what the relocation work might require. The Commission recognized this fact in 2014 and should do so again.

2. Disregard for the Original Site Boundaries Would Lead to a "Bloating Tower" Problem Similar to the "Blooming Tower" Problem in the *2014 Infrastructure Order*

The Commission should reject WIA's proposal to measure the expansion space from the current site boundaries at the time an applicant requests approval.[173] Western Communities Coalition agrees with NLC *et al.* that this proposal would contravene the Commission's existing rules and its justifications for those rules offered to the Fourth Circuit in *Montgomery County*.[174]

In addition, the Commission should recognize that it previously rejected a similar proposal by WIA (then known as PCIA) with respect to serial height increases. The potential for a "blooming tower" that could grow under successive by-right

[173] *See* WIA Dec. R. Petition at 18.
[174] *See* NLC *et al.* Comments at 10–12.

modifications troubled the Commission then and the current potential for a "bloating tower" raises nearly identical concerns.

Rule 1.6100(b)(7)(i)(A) establishes a cumulative limit on height extensions by-right under Section 6409(a).[175] At the time the Commission adopted the cumulative limit, it noted that:

> We agree with commenters that our substantial change criteria for changes in height should be applied as limits on cumulative changes; *otherwise, a series of permissible small changes could result in an overall change that significantly exceeds our adopted standards*. Specifically, we find that whether a modification constitutes a substantial change must be determined by measuring the change in height from the dimensions of the "tower or base station" as originally approved or as of the most recent modification that received local zoning or similar regulatory approval prior to the passage of the Spectrum Act, whichever is greater.[176]

The Commission also rejected a proposal by WIA (then known as PCIA) to measure the permissible increase in height "from the last approved change or the effective date of the rules."[177] This decision rested on the commonsense observations that such an illusory baseline would conflict with the Commission's policies and create impractical burdens on both local authorities and applicants:

> [m]easuring from the last approved change in all cases would provide *no cumulative limit at all*. In particular, since the Spectrum Act became law, approval of covered requests has been mandatory and therefore, approved changes after that time may not establish an appropriate baseline because they may not reflect a siting authority's judgment that the modified structure is consistent with local land use values. Because it is impractical to require

[175] *See* 47 C.F.R. § 1.6100(b)(7)(i)(A).
[176] *2014 Infrastructure Order* at ¶ 196 (emphasis added) (internal footnotes omitted).
[177] *Id.* at ¶ 197 (citing PCIA Comments at 36).

> parties, in measuring cumulative impact, to determine whether each pre-existing modification was or was not required by the Spectrum Act, we provide that modifications of an existing tower or base station that occur after the passage of the Spectrum Act will not change the baseline for purposes of measuring substantial change.[178]

Here, WIA proposes the same illusory standard applied to compound expansions rather than tower extensions. Whereas height increases measured from the last approval would allow for a "blooming" tower, site expansions measured from the current site boundaries would allow for a "bloating" tower compound.

Indeed, the standard could produce even greater harm to the legitimate local interest in discretion over the original deployment because the "site" boundaries (*i.e.*, the "leased or owned area") could be increased after the approval without the local government's knowledge. This creates an added and impractical burden on local officials and applicants to determine precise boundary lines around leasehold estates. Just as the Commission found it "impractical" to determine whether Section 6409(a) covered prior height increases as baseline, it should also find that the proposal to measure expansions from the current site boundaries creates unreasonable burdens.[179]

3. If the Commission Grants WIA's Petition for a Rulemaking, Any Expansions Must Be Subject to Commonsense Limitations

[178] *2014 Infrastructure Order* at ¶ 197.

[179] Although local governments could shift the burden to applicants with a property-line survey requirement, which would be reasonably related to whether the expansion fit within a threshold from the "current" site boundaries, such surveys require additional time and money to produce. Such delays and costs associated with this proposal's implementation should be considered yet another reason to maintain the existing standards.

To be clear, the Commission should reject WIA's Petition for a Rulemaking. However, if the Commission grants the petition, any proposed amendments to the rules should include some commonsense limitations, which includes without limitation all the following:

- ***Expansions Should be Narrowly Tailored Based on the Actual Space Reasonably Required for Collocations:*** As explained above, the 30-foot expansion standard from the NPA bears no rational relationship to the space needed for collocated wireless facilities. Although any expansion should be considered a substantial change, a more rational measure for expansion space would be square footage and the maximum should be determined by the equipment site operators normally install for standby power and collocations.

- ***Expansions Should be Measured from the Original Site Boundaries to Avoid "Bloating Tower" Problems:*** As explained above, WIA's proposal to disregard the original site boundaries is as untenable and impractical as its prior proposal to disregard the original structure height.

- ***Expansions Should Be Limited to Equipment Compounds and Should Not Include Utility and Access Easements:*** Utility and access easements connect the equipment compound to the public rights-of-way. An average utility easement is between six and ten feet wide; access easements average between 12 and 30 feet wide. Moreover, these nonexclusive pathways may be long and indirect when the tower sits on large or densely developed properties. Any right to expand to these areas would increase the likelihood for conflicts with other uses on the property and could lead to noncontiguous compounds. Consistent with the existing rules, this proposed limitation would not prevent the site operator from excavations or new deployments within existing utility or access easements, as may be necessary to support the additional transmission equipment within the compound.[180]

- ***Expansion Space Must be Physically Contiguous with the Original Site Boundaries:*** Section 6409(a) applies only to changes to *existing* wireless towers or base stations.[181] A rule that allowed for expansion space detached from the current site boundaries would effectively authorize a new site for transmission equipment.

[180] *See* 47 C.F.R. § 1.6100(b)(7)(iv).
[181] *See* 47 U.S.C. § 1455(a); 47 C.F.R. § 1.6100(b)(5); *2014 Infrastructure Order* at ¶ 174.

- ***Expansions Must be Limited to Existing Towers Not Located within the Public Rights-of-Way:*** The Commission has previously recognized that physical changes in facilities sited on utility infrastructure or within the public rights-of-way must be treated differently. In almost all respects, the thresholds for a substantial change are stricter for utility structures and ROW facilities. As noted in our comments, the proposed rule would allow new equipment and ground disturbance to occur clear across the street in many common ROW scenarios.[182] Thus, any additional rights to expand should not be applicable to base stations on private property or any facilities located in any utility easements or public rights-of-way.[183]

- ***Expansions Must Not be Permitted to Encroach into Any Setbacks Applicable to the Underlying Property or Proposed Use:*** WIA and its allies complain that some unnamed communities expand their setbacks to create noncompliance. However, in an expansion scenario, the roles are reversed, and the site operator pushes into an existing setback. Without a limitation on expansions into setbacks, the Commission would effectively invite site operators to violate otherwise valid regulations.

- ***Local Authorities Must Retain Reasonable Discretion to Require Extended and/or Additional Concealment for Compound Expansions:*** Where the expansion occurs matters. Many local governments carefully and thoughtfully consider the site location and configuration to mitigate unnecessary adverse impacts on other uses. The proposed rule would effectively undo those efforts and defeat legitimate local interests. Without the opportunity to ensure that the expansion area comports with the existing site, we are likely to see "Frankenstein" sites with mixed materials and construction techniques.

Additional limitations and/or refinements to the proposed limitations above should be considered in a notice of inquiry or notice of proposed rulemaking issued by the Commission.

V. LEGAL NON-CONFORMING STATUS DOES NOT INCLUDE STRUCTURES OR PROPERTIES WITH HEALTH AND SAFETY VIOLATIONS

[182] Western Communities Coalition Comments at 53-55.

[183] *See, e.g.*, Nokia Comments at 8–9 (arguing that the need for expansion is primarily associated with "[t]ower sites"); Crown Castle Comments at 32 (referencing state laws that address requirements for "modifications to existing towers"); CTIA Comments at 15-16 (discussing how the "tower model" has changed as a justification); WIA Comments at 6 (requesting rule change in the context of a "tower site boundary").

The Commission should reject arguments by industry commenters that the exception for legal non-conforming structures in the *2014 Infrastructure Order* exempts site operators from compliance with updates to generally applicable health and safety regulations.[184]

Legal non-conforming status does not cover changes to structures and properties with conditions that violate health and safety regulations. Whether a health and safety requirement existed before or after a site's initial construction date is irrelevant.

Changes in health and safety regulations reflect new understandings about potential harms and how to mitigate the risk. For example, after several devastating wildfire seasons, California amended its state law to require clearances between vegetation and occupied structures in high fire hazard zones.[185] If local officials refused to approve an eligible facilities request on an existing tower that violated the new fire safety setback, would the Commission preempt the code's application to the facility merely based on its adoption date? Of course not.

Structures that violate generally applicable public health and safety laws are nuisances subject to abatement. If the noncompliance cannot (or will not) be cured, the structure is ordinarily condemned. From the local government perspective, applications to intensify existing uses on a structure that may be condemned waste everyone's time and resources.

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[184] *See, e.g.*, Crown Castle Comments at 15.

[185] *See* S.B. 833, 2009-2010 Leg., Reg. Sess. (Cal. 2009) (amending Cal. Gov. Code § 51182(a)(1) to create a fixed "defensible space of 100 feet" from each side and from the front and rear of the structure).

VI. FEE ISSUES

A. Section 6409(a) Does Not Invite the Commission to Impose Restrictions on Fees or Other Charges by Local Governments

Several industry commenters argue fees and other charges by local governments in connection with eligible facilities requests conflict with Section 6409(a)'s mandate to approve covered requests.[186] These arguments misread the statute and overstate the Commission's authority.

Section 6409(a) says nothing about fees or other charges in connection with an eligible facilities request.[187] The statute preempts state and local authority to deny certain applications but not what may be charged to review and process those applications. If Congress intended to limit fees associated with eligible facilities requests, it presumably would have included limitations on the application process like those contained in Section 6409(c)(3).[188]

At least one industry commenter also appears confused about the distinction between regulatory fees to process permit applications and proprietary charges for access to government property. ACT complains that proprietary discretion:

> creates confusion in the market and results in unreasonable denials of EFR status to tower owners, thus, excluding those applicants from various Section 6409(a) protections. Without such protections, some state and local agencies have enforced requirements increasingly unconnected to the public interest, which, at times, serve as a measure to extract maximum revenue from those deploying broadband infrastructure. Some egregious examples include state and municipal authorities

[186] *See* WISPA Comments at 9; ACT Comments at 8; WIA Comments at 8.
[187] *See* 47 U.S.C. § 1455(a).
[188] *See id*. § 1455(c)(3).

> requiring tower owners to pay additional fees for nominal compound expansions (sometimes as minor as five feet).[189]

Yet the Commission already made clear "that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities."[190] The statute does not "protect" potential collocators from landlords that, as a rational economic actor, require additional rent for additional space under a ground lease.

Perhaps in acknowledgment that the statute provides no basis to limit fees in connection with eligible facilities requests, some commenters attempt to draw comparisons to other instances where the Commission limited fees imposed by local authorities. But comparisons to Commission regulations on fees in its actions under the *Small Cell Order* are misplaced.

Contrary to comments by AT&T and others, there is no corollary between fees for eligible facilities requests and fees for small wireless facilities.[191] The Commission's limitations on fees in the *Small Cell Order* followed from its assumption that, given the massive small-cell deployments and anticipated capital costs, any fees above actual cost would result in an effective prohibition.[192] No such record exists before the Commission in this proceeding. In fact, some industry commenters boast about how successful their Section 6409(a) deployments have been.[193]

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[189] ACT Comments at 8.
[190] *2014 Infrastructure Order* at ¶ 239.
[191] *See* AT&T Comments at 33.
[192] *See Small Cell Order* at ¶ 47-48, 60, 65.
[193] *See, e.g.*, AT&T Comments at 29.

Moreover, the proposed limitation would cover fees for collocated facilities not covered by Sections 253 or 332(c)(7). In the *Small Cell Order*, the Commission purported to draw its authority for the limitations on fees from the bar against "effective prohibitions" in Sections 253(a) and 332(c)(7)(B)(i)(II).[194] However, the facilities and services covered by these provisions are not necessarily the same as those covered by Section 6409(a). For example, if a private mobile radio service sought to collocate on an existing broadcast tower, Section 6409(a) might be applicable but Sections 253 and 332 would not.[195]

Nokia also cites to the *Second Report and Order*[196] as support for the Commission's authority to preempt state and local fees.[197] However, the D.C. Circuit recently invalidated the Commission's attempt to eliminate certain tribal review processes for small wireless facilities as arbitrary and capricious.[198] Although the court upheld the Commission's determination that upfront payments to tribes for

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[194] *See Small Cell Order* at ¶ 46. The Commission should not rely on its rationale for fee limitations in the *Small Cell Order* given its current status under judicial review. Although the Tenth Circuit denied a motion to stay, that motion did not gainsay the petitions' merits. Moreover, the Ninth Circuit's recent order granting expedited oral argument could only be granted if the court perceived both irreparable harm to the petitioners and a likelihood that the *Small Cell Order* should be invalidated in whole or in part. At best, it would be imprudent for the Commission to limit fees for eligible facilities requests based on a rationale that could be invalidated in the near future.

[195] *See, e.g.*, WISPA Comments at 3 ("Providers of fixed wireless broadband services are covered by Section 6409(a), but may not be covered by other sections of the Communications Act that address state and local siting authority."). Although WISPA attempts to draw a parallel between fixed wireless providers and small-cell providers, no comparisons between the two groups can overcome the simple fact that neither Section 6409(a) nor the *Small Cell Order* provides a statutory basis for limitations on fees for facilities not covered by Section 253 or Section 332(c)(7). *See* WISPA Comments at 3.

[196] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, 2018 WL 1559856 (F.C.C.) (Mar. 22, 2018).

[197] Nokia Comments at 3 n.5.

[198] *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019).

consultation are voluntary, it specifically noted that the *Second Report and Order* did not attempt to prohibit tribes from attempting to collect fees.[199] Thus, the Commission should not rely on the *Second Report and Order* as support for the Commission's authority to limit state and local fees for eligible facilities requests.

B. The Commission Should Not Deem Granted Permits Withheld Due to Unpaid Fees

WIA's proposal to authorize construction notwithstanding a disputed fee is out-of-step with normal practice for disputes over development fees. Like many fees or other impositions by federal, state and local governments, development and permit fees must be paid prior to approval. If a dispute arises, the fees may be paid under protest.[200]

The Commission should consider how this rule will work in practice. State and local governments generally require applicants to pay permit fees in advance at the time the application is initially filed.[201] Fees for ministerial permits may also be charged at the time the applicant arrives to physically receive its permit. If an applicant "disputes" a fee and refuses to tender payment, the local government will not be able to fund the application review (or issue the approved permit) and the applicant will ultimately claim the application was deemed granted.

C. Escrow and Deposit Accounts Serve Important Interests for both Local Governments and Applicants

[199] *Id.* at 747–48.
[200] *See* CAL. GOV. CODE § 66020.
[201] *See e.g.*, Western Communities Coalition Comments at 62.

Contrary to the industry's comments, escrow accounts are a common feature in development projects that ensure cost-based fees. The escrow allows local government staff to draw down funds as it incurs actual costs. Compared to a flat application fee, an escrow account protects against both underpayments and overpayments. Flat application fees too low to cover the actual costs directly caused by an application turn local governments into subsidizers for the deployment or unsecured creditors who must chase down reimbursement.

Escrow accounts are particularly useful when the applicant intends to undertake large and/or serial projects. In these situations, the actual cost may be difficult to calculate in advance because, for example, the project scope may change or the parties may discover unanticipated efficiencies.

Nokia suggests that escrow accounts should be limited to costs associated with local review to determine whether Section 6409(a) applies or not.[202] This makes little sense given that local governments will incur costs to perform other review and permit issuance services after the initial determination. The limitation suggested by Nokia would merely add additional process for both the local government and the applicant as they switch from one fee-payment mechanism to another.

[202] *See* Nokia Comments at 9.

CONCLUSION

For all the reasons stated above, the Commission should reject the petitions for declaratory ruling filed by WIA and CTIA and the petition for rulemaking filed by WIA.

November 20, 2019

Respectfully submitted,

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California; and City of Thousand Oaks,
California.

EXHIBIT A

Affidavit of Edward Stafford

[appears behind this coversheet]

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

AFFIDAVIT OF EDWARD STAFFORD

Edward Stafford declares as follows:

1. Since January 23, 2014, I have been employed by the City of Boulder as the Development Review Manager for Public Works.

2. My duties as Development Review Manager for Public Works include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the CTIA – The Wireless Association (CTIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The CTIA petition for declaratory ruling alleges that a Colorado jurisdiction failed to act on a wireless provider's request for slight relocation of and additional screening for sectors on a rooftop by seeking a lease for the airspace above the street where one sector is being façade mounted.

5. I have reason to believe based on my experience with processing applications for personal wireless service facilities that this is referencing an application for a facility in Boulder.

6. In March of 2018 a wireless provider submitted an application to the City of Boulder for an Eligible Facility Request for a property located at 2060 Broadway in Boulder Colorado. The review of the application determined that the current installation had not been lawfully permitted and was therefore not an Eligible Facility Request. The application was withdrawn in October of 2019 and the wireless provider then proceeded with obtaining permits to make the current facility lawfully established. In July 2019 a subsequent application for an Eligible Facility Request was submitted to the city and the application included a relocation of an antennae to the east face of the building, projecting over the property line into the city's right-of-way. The applicant did not have a right to occupy the city right-of-way and such encroachment is prohibited by the Boulder Revised Code. City staff have worked with the applicant to develop an option to locate the antennae on the roof of the building so that it occupies only the area the applicant has a leased interest in. As of October 25, 2019, the city has not received revised plans for this option.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Boulder, Colorado, on October 28, 2019:

Edward Stafford
Development Review Manager –
Public Works
City of Boulder, Colorado